Supreme Court, U.S.
FILED

No. 09-856 JAN 15 2010

OFFICE OF THE CLERK
William K. Suter Clerk

In The Supreme Court of the United States

ANGELA MONTGOMERY,

Petitioner,

v.

WYETH, f/k/a American Home Products Corporation, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

D. BRIAN RATTLIFF
Counsel of Record
CHRISTOPHER W. GOODE
BUBALO, HIESTAND & ROTMAN, PLC
9300 SHELBYVILLE ROAD, SUITE 215
LOUISVILLE, KENTUCKY 40222
TELEPHONE: 502.753.1600
FACSIMILE: 502.753.1601
E-MAIL: brattliff@bhtriallaw.com

Counsel for Petitioner

January 15, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Did the Courts below exceed their subject matter jurisdiction by interpreting and applying an MDL National Settlement Agreement over which the MDL Court had retained "continuing" and "exclusive" jurisdiction?

Does procedural due process require that a state statute of repose not be applied to bar a Plaintiff's claim where she was enjoined by MDL Orders as a Class Member from bringing that claim *before* the state statute of repose barred her claim?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing before the United States Court of Appeals for the Sixth Circuit:

Petitioner -Angela Montgomery

Respondent -Wyeth, f/k/a American Home Products Corporation

Respondent- AHP Subsidiary Holding Corporation, f/k/a/ Wyeth-Ayerst Labs. Co.

Respondent – Wyeth Pharmaceuticals, Inc., f/k/a Wyeth-Ayerst Pharmaceuticals, Inc.

Amicus Curiae – Class Counsel in *Brown v. Wyeth*

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED .. 1

STATEMENT OF THE CASE 2

A. The Diet Drug MDL 5

REASONS FOR GRANTING THE PETITION ... 9

I. The Diet Drug MDL Court retained exclusive jurisdiction to interpret the Settlement Agreement and related Orders. 11

II. The Sixth Circuit Opinion conflicts with the MDL determination that Angela Montgomery and other class members similarly situated were adequately represented and their rights were "fully preserved". 12

III. Affirming the Sixth Circuit's opinion will undermine the effectiveness of MDL courts in the future by making retained jurisdiction illusory. 18

CONCLUSION 21

APPENDIX

Appendix A: Sixth Circuit Opinion/Judgment, dated August 28, 2009 ..... 1a

Appendix B: District Court Memorandum/ Order, dated March 19, 2009 ..... 36a

Appendix C: District Court Order, dated May 22, 2009 ..... 61a

Appendix D: Sixth Circuit Order denying rehearing, dated October 23, 2009 ..... 67a

Appendix E: U.S. Const. amend V 69a

TABLE OF AUTHORITIES

CASES

Brown v. Am. Home Prods. Corp. (In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.),
MDL 1203 PTO 2623, 2002 U.S. Dist. LEXIS 20323 (E.D. Pa. Oct. 8, 2002) 6

Brown v. Am. Home Prods. Corp. (In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.),
MDL 1203, Civ. No. 99-20593, 2003 U.S. Dist. LEXIS 19846 (E. D. Pa. Oct. 10, 2003) 15

Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.),
MDL 1203 PTO 3085, 2003 U.S. Dist. LEXIS 20221 (E.D. Pa. Oct. 24, 2003) 7

Ford v. Hamilton Inv.,
29 F.3d 255 (6th Cir. Mich. 1994) 12

In re Diet Drugs Prods. Liab. Litig.,
369 F.3d 293 (3d Cir. 2004) 5, 6, 16

In re Diet Drugs Prods. Liab. Litig.,
434 F. Supp. 2d 323 (E.D. Pa. 2006) 5

In re Diet Drugs Prods. Liab. Litig.,
553 F. Supp. 2d 442 (E.D. Pa. 2008) 17

In re Diet Drugs Prods. Liab. Litig.,
431 F.3d 141 (3rd Cir. 2005) 8

In re Diet Drugs,
MDL No. 1203, Civ. Action No. 99-20593, PTO 1415, 2000 U.S. Dist. Lexis 12275 (E.D. Pa. Aug. 28, 2000) 6, 7

In re Diet Drugs,
No. Civ. A. 99-20593, 2003 WL 22669132 (E.D. Pa. Oct. 24, 2003) 8

Riggs v. Island Creek Coal Co.,
542 F.2d 339 (6th Cir. 1976) 12

Stephenson v. Dow Chem. Co.,
273 F.3d 249 (2d Cir. 2001), *cert. granted*, 123 S. Ct. 485 (2002), *aff'd in part and vacated in part*, 123 S.Ct. 1261 (2003)(*per curiam*) 13

United States v. Albertini,
472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) 16

CONSTITUTION

U.S. Const. Amend V 1

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1407(a) 18

28 U.S.C. § 1441 3

28 U.S.C. § 1446 3

28 U.S.C. § 1651(a) 9

Tenn. Code Ann. § 29-28-103 . . . . . 4, 15

Tenn. Code Ann. § 29-28-103(a) 4

RULES

DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL: PRACTICE BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION § 1.1 (2005) 18

OTHER AUTHORITIES

Wolff, T.B., *Preclusion in Class Action Litigation*, 105 Colum.L.Rev. 717 (April, 2005) 9

PETITION FOR A WRIT OF CERTIORARI

Angela Montgomery, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Tennessee is reported at 540 F. Supp. 2d 933; 2008 U.S. Dist. LEXIS 23591, and is reprinted in the Appendix to the Petition at 36a.

The opinion of the Court of Appeals for the Sixth Circuit is reported at 580 F.3d 455; 2009 U.S. App. LEXIS 19386; 2009 FED App. 0314P (6th Cir.) and is reprinted in the Appendix to the Petition at 1a. The Sixth Circuit's order denying rehearing *en banc* is reported at 2009 U.S. App. LEXIS 23703 and is reprinted in the Appendix to the Petition at 67a.

JURISDICTION

The Court of Appeals entered its opinion on August 28, 2009, and denied Petitioner's Petition for Rehearing En Banc on October 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The principal provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

With the rise in use of "Multidistrict Litigation" ("MDL"), and the value to the civil justice system and the affected parties of an effective and sound mechanism for the settlement of numerous claims, this case has far reaching implications as to the effectiveness of such a vehicle in future litigation.

This proceeding presents a question of exceptional importance involving the proper interpretation of the national Diet Drug class certification and settlement as applied to latent injury claims and what court has the jurisdiction to make that determination. The Sixth Circuit opinion conflicts with fundamental holdings of both the Diet Drug MDL judge and the Third Circuit that class members in the position of Angela Montgomery were adequately represented in the Diet Drug proceedings and that their rights to bring claims were "fully preserved" consistent with due process requirements. The decision in this case will affect not only Angela Montgomery, but all class members similarly situated[1] who were diagnosed with primary pulmonary hypertension ("PPH") after September 2, 2001, but who could not have filed an action before that date because they were precluded by Orders of the Diet Drug MDL from bringing an action before they satisfied a stringent definition of the disease (PPH) caused by exposure to the diet drugs imposed by the MDL Court. As such, the issue is not a case specific one, but one of general application that should have

---

[1] *Brief for the Appellant* at p. 2, n.2 in lists other cases where Defendants have made similar motions.

been decided by the Diet Drug MDL Court pursuant to its claim that it retained exclusive jurisdiction.

Petitioner, Angela Montgomery, a Tennessee resident, filed this action on October 20, 2005, seeking recovery for injuries caused by her ingestion of "Fenphen;" a combination diet drug therapy that included Wyeth's diet drug, Pondimin®. Wyeth's drug caused Mrs. Montgomery to develop PPH, a serious and usually fatal lung disease. Her PPH was not diagnosed until 2005. She filed the present action within six (6) months after being diagnosed, well within the Tennessee statute of limitations.

The action was originally filed in state court, but was removed by defendants and then transferred to the Diet Drug MDL for coordinated pretrial proceedings. Federal jurisdiction was based on diversity of citizenship pursuant to 28 U.S.C. §§ 1441 and 1446. After extensive discovery, the matter was remanded back to the Eastern District of Tennessee on July 14, 2007, and scheduled for trial on June 9, 2008.[2]

Following remand, and just six months before trial, defendants moved for summary judgment seeking dismissal of Mrs. Montgomery's claims based on the

---

[2] This action was pending for some 32 months before the trial court decision. Of that time, some 17 months were spent in the Diet Drug MDL. Wyeth never raised the TSOR before the MDL Court, despite that Court being better equipped to interpret and apply the Settlement Agreement and MDL orders and having retained "exclusive" jurisdiction of such issues.

Tennessee Statute of Repose, Tenn. Code Ann. § 29-28-103 ("TSOR").[3]

Petitioner advanced several arguments before the trial court and on appeal, including that the TSOR was satisfied by Montgomery's inclusion in the MDL class action proceedings, that the settlement agreement "fully preserved" the claims of class members with latent[4] PPH injuries, that the TSOR did not apply based on choice of law, that the TSOR was waived, and that the "anticipated life of the product" ... provision of the TSOR does not apply because there was no expiration date placed on the product actually sold to plaintiff. The first and second arguments clearly required interpretation and application of the Diet Drug Settlement Agreement and related orders.

The trial court found that the expiration date of the product was September 2, 2000, and that any action had to have been commenced by no later than September 2, 2001, almost 4 years before Angela Montgomery was even diagnosed with PPH. Acknowledging that Orders in the Diet Drug MDL precluded Angela Montgomery from filing an action before a diagnosis of PPH, the trial court nevertheless granted summary judgment on March 19, 2008. *Montgomery v. Wyeth*, 540 F. Supp. 2d 933 (E.D. Tenn. 2008). This appeal followed.

---

[3] That statute requires an action to "be brought within one (1) year after the expiration of the anticipated life of the product...." Tenn. Code Ann. § 29-28-103(a).

[4] The disease characteristically develops and manifests over a period of time after exposure to the diet drugs and after some period of latency ranging from months to years.

A. The Diet Drug MDL

On September 15, 1997, Wyeth withdrew its diet drugs from the market because the drugs caused and presented an unacceptable level of increased risk of both PPH and valvular heart disease. A tidal wave of litigation followed. By 1999, this wave encompassed approximately 18,000 lawsuits in which individuals sought to recover compensatory and punitive damages on account of heart and lung injuries they allegedly sustained as a result of ingesting Wyeth's anorexic agents. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293, 298 (3d Cir. 2004). In addition, numerous class actions were instituted against Wyeth in which plaintiffs sought "medical monitoring, purchase price refunds and/or personal injury damages." *Id.* The Judicial Panel for Multidistrict Litigation entered an order transferring all federal actions to the United States District Court for the Eastern District of Pennsylvania for coordinated and/or consolidated pretrial proceedings under MDL Docket No. 1203. *See Diet Drugs,* 369 F.3d at 298.

Against this background, Wyeth and class counsel initiated negotiations for a "global resolution" of the diet drug claims. Those negotiations resulted in an agreement to settle the litigation on a class basis. A class action complaint was filed "as a vehicle for combining the claims of class members asserted in pending federal and state Diet Drug litigation throughout the country into a single complaint to facilitate class action treatment of those claims for settlement purposes." *In re Diet Drugs Prods. Liab. Litig.*, 434 F. Supp. 2d 323, 327 (E.D. Pa. 2006).

Following an extensive "fairness hearing," the MDL Court certified the *Brown* action to proceed as a class action on behalf of a class consisting of "[a]ll persons in the United States...who ingested Pondimin and/or Redux...." *In re Diet Drugs,* MDL No. 1203, Civ. Action No. 99-20593, PTO 1415, 2000 U.S. Dist. Lexis 12275 *60 (E.D. Pa. Aug. 28, 2000). In the same order, the Court approved the Class Settlement and directed the implementation of the Settlement Agreement in accordance with its terms. The order was later affirmed by the United States Court of Appeals for the Third Circuit without opinion. *See Diet Drugs,* 369 F.3d at 300.

The Class Settlement accomplished Wyeth's goal of obtaining a truly "global" solution to the enormous legal and financial exposure it faced as a result of the Diet Drug litigation. The class clearly included persons with both diagnosed and latent PPH claims:

> Because all class members face the same, albeit remote, possibility of developing PPH in the future, we believe that the interests of class members regarding the PPH definition were properly represented at the time of negotiations, notwithstanding that there was no specific PPH subclass.

Brown v. Am. Home Prods. Corp. (In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.), MDL 1203 PTO 2623, 2002 U.S. Dist. LEXIS 20323, FN 3 (E.D. Pa. Oct. 8, 2002). The Court rejected challenges that the class, as defined, inadequately represented PPH Class Members: "Clearly, [class] counsel [in MDL-1203] representing subclasses 1(a) and 1(b) were representing all persons

who took Pondimin® and/or Redux™, **including necessarily those who did or would later suffer from PPH.**" *Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.)*, MDL 1203 PTO 3085, 2003 U.S. Dist. LEXIS 20221 *15 (E.D. Pa. Oct. 24, 2003) (emphasis added). The Settlement Agreement "fully preserve[d] the rights of class members to recovery against [Wyeth] if they **have or develop PPH....**" *In re Diet Drugs,* MDL No. 1203, Civ. Action No. 99-20593, PTO 1415, 2000 U.S. Dist. Lexis 12275 *92 (E.D. Pa. Aug. 28, 2000) (emphasis added).

The Settlement Agreement itself settled most claims, including those for valvular heart disease, but did not settle claims for PPH, although it imposed conditions for such claims to be brought as individual claims in state and federal court. As is customary, the *Brown* Complaint was dismissed as to "settled claims," but PPH claims were not "settled claims" as defined by PTO 1415 and therefore remained (and remain to this day) subject to the continuing and exclusive jurisdiction of the MDL Court. PTO 1415 specifically provided:

> Without affecting the finality of this Final Order and Judgment in any way, **the court hereby retains continuing and exclusive jurisdiction over this action** and each of the Parties, including AHP and the class members, **to administer, supervise, interpret and enforce the Settlement in accordance with its terms**; ...and to enter such other and

> further orders as are needed to effectuate the terms of the Settlement.[5]

In return for the agreement to "fully preserve" the rights of class members who might later develop PPH, the settlement included a detailed definition of PPH and class members were enjoined from asserting claims for PPH unless and until they met that definition. That requirement was critical to Wyeth because it otherwise faced a significant risk that Diet Drug recipients who suffered from the relatively common *symptom* of pulmonary hypertension (elevated pulmonary artery pressure) would claim damages for the relatively uncommon *disease* known as Primary Pulmonary Hypertension ("PPH"). *See In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 148 (3rd Cir. 2005); *In re Diet Drugs*, No. Civ. A. 99-20593, 2003 WL 22669132 at *3 (E.D. Pa. Oct. 24, 2003).

This ability to employ the "all writs" authority of the federal court to enjoin suits not meeting the settlement definition of PPH allowed Wyeth to make a reliable prediction of its potential PPH liability and to create a meaningful reserve against that liability, thereby creating financial stability for the company.[6] In other words, the inclusion of latent PPH claims within the umbrella of the settlement afforded Wyeth a truly "global" peace, in return for which the settlement agreement "fully preserves" the rights of future PPH claimants.

---

[5] PTO 1415, ¶11, Record Entry No. 98, Ex. 12; ROA Vol. 6, p. 1006 (emphasis added).

[6] As a result, the terms of the Diet Drug Settlement accomplished the same goals underlying the TSOR.

ARGUMENT AND REASONS FOR GRANTING THE PETITION

The Court should grant this Petition for four basic reasons.

First, the Diet Drug MDL Court retained exclusive jurisdiction to interpret the Settlement Agreement and related Orders, thus the Sixth Circuit and trial court lacked subject matter jurisdiction to interpret the agreement. Thus, granting this petition will enable this Court to determine the extent of MDL jurisdiction under the restraints of due process and the All Writs Act. 28 U.S.C. § 1651(a).

Second, the Sixth Circuit Opinion cannot be reconciled with the MDL determination that Angela Montgomery and other class members similarly situated were adequately represented and their due process rights preserved.

Third, affirming the Sixth Circuit's opinion will undermine the effectiveness of MDL courts in the future by making retained exclusive jurisdiction illusory. This case presents an ideal vehicle for solidifying the effectiveness of an MDL court's retained, exclusive jurisdiction.

Fourth, this case will provide a vehicle to clarify the due process restraints in the exercise of class action jurisdiction over absentee class members. *See, e.g.*, Wolff, T.B., *Preclusion in Class Action Litigation*, 105 Colum.L.Rev. 717, 722-723 (April, 2005).

The Sixth Circuit correctly held that Angela Montgomery was a member of the class certified in

MDL 1203, and that she was precluded from filing suit until she met the definition of PPH set forth in the settlement.

The concurring opinion correctly observed that all PPH claims were filed in the Diet Drug MDL before the time bar imposed by TSOR[7] and that the settlement agreement clearly affected Angela Montgomery's rights. If PPH claims were not asserted, the MDL Court could not have exercised jurisdiction over such claims or placed limitations on the right to assert claims for PPH. That being the case, the settlement agreement must be interpreted in a way comporting with adequate representation and due process. As the concurring opinion notes, "the only way Montgomery's claim remains unaffected by the Settlement Agreement, as represented in the class notice, is if the Agreement is interpreted to bar Wyeth's assertion of the TSOR defense." App. at 32a.

More fundamentally, the Diet Drug MDL Court retained continuing and exclusive jurisdiction to decide such questions. As a result, both the trial court and the Sixth Circuit lacked jurisdiction to decide the issue. Despite the retention of jurisdiction under the All Writs Act by the MDL Court, both the Sixth Circuit and the Eastern District of Tennessee decided matters central to issues pending exclusively before the MDL Court.

---

[7] "As stated above, Montgomery was a member of the class, the action was brought within the TSOR, and the court expressly exercised jurisdiction over all claims."" App. at 31a.

I. The Diet Drug MDL Court retained exclusive jurisdiction to interpret the Settlement Agreement and related Orders.

The motion for summary judgment presented several issues of Tennessee law, any of which could have been decided in favor of Petitioner to deny summary judgment. Because those arguments were not accepted by the trial court as a basis for denying summary judgment, the motion necessarily required consideration of the Diet Drug class certification and settlement – issues over which the Diet Drug MDL Court retained "continuing and exclusive" jurisdiction. Wyeth had to have known this, yet it failed to raise the issue before the MDL court.

A federal court must always be sensitive to the limits of its jurisdiction. Here, the only court with jurisdiction to determine whether the class certification and settlement preserved Petitioner's right to sue was the Diet Drug MDL Court. Petitioner advised both the trial court and the Sixth Circuit of this jurisdictional limitation,[8] but both nevertheless

---

[8] Reply Brief in Support of Motion to Alter or Amend, Record Entry No. 113; EOA Vol. 6, pp. 1676, 1682); Brief of Appellant, p. 54. Judge White suggested that Petitioner should have moved to transfer, or "unremand" in the District Court; however, such a motion would have been premature in light of the other issues—such as choice of law—that would have obviated any need for an interpretation of the MDL agreement. In any case, this does not change the fact that the Sixth Circuit and the District Court lack subject matter jurisdiction.

proceeded to interpret and apply the settlement agreement.[9]

That improper exercise of jurisdiction is especially egregious given the plausibility of Petitioner's arguments and their consistency with the clear intent of the Diet Drug MDL. The concurring opinion acknowledged that Petitioner's arguments regarding the proper interpretation of the Settlement Agreement are "plausible" and that "the MDL court might have agreed with one or all of them." App. at 32a. The lack of jurisdiction requires that this Court grant this Petition and reverse the Sixth Circuit opinion based upon the interpretation of the Settlement Agreement and related orders, and remand this action to the trial court so that it can be transferred to the Diet Drug MDL for a decision on those issues. Alternatively, the Court should grant this Petition and ultimately hold that Wyeth waived its right to rely upon the TSOR by failing to raise the issue in the proper forum.

II. The Sixth Circuit Opinion conflicts with the MDL determination that Angela Montgomery and other class members similarly situated were adequately represented and their rights were "fully preserved".

The clear intent of the class settlement agreement and MDL Court Orders implementing it, was to "fully

---

[9] The existence of subject matter jurisdiction may be raised at any time, by any party, or even *sua sponte* by the court itself. *Ford v. Hamilton Inv.*, 29 F.3d 255, 257 (6th Cir. Mich. 1994). Parties cannot waive the requirement of subject matter jurisdiction. *Riggs v. Island Creek Coal Co.*, 542 F.2d 339, 343 (6th Cir. 1976).

preserve" the rights of class members who may later develop PPH. The Sixth Circuit's interpretation of the agreement cannot be reconciled with that language. Angela Montgomery was a member of the class certified in MDL 1203 and her rights, like those of other potential PPH claimants had to be adequately represented. Yet under the Sixth Circuit interpretation, her inclusion in the class, when coupled with the limitation placed on her right to sue stripped her of any potential claim before it ever accrued. That cannot have been the intent of the MDL Court when it stated such claims were to be "fully preserved" and is inconsistent with fundamental principles of due process in this context. The only interpretation of the settlement agreement consistent with the requirements of adequate representation and due process is that the settlement agreement "fully preserves" the rights of potential PPH claimants to sue once they meet the settlement definition of PPH. Any other interpretation is simply untenable.

Adequacy of representation is the bedrock guarantee for all absent class members in every form of class action in every court, federal and state. It is the rule because it is consistent with basic understandings of procedural justice that underlie much of the Supreme Court's Due Process Clause jurisprudence. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *cert. granted*, 123 S. Ct. 485 (2002), *aff'd in part and vacated in part*, 123 S.Ct. 1261 (2003)(*per curiam*). The Sixth Circuit's conclusion that the TSOR bars Petitioner's claims, is inconsistent with the MDL Court's and Third Circuit's determination that those class members with latent PPH claims were adequately represented in the MDL. Similarly, applying the TSOR to bar this action would mean that

the MDL Court also failed to adequately consider the preclusive effect of its class certification and judgment on latent PPH claims where the plaintiff resides in states with statutes of repose. This unconstitutional result can be avoided by a common sense interpretation and a holding that the TSOR does not bar this action.

To be clear: Angela Montgomery does NOT claim that PPH class members were inadequately represented. Rather, she contends that class members were adequately represented—but that the trial court and Sixth Circuit rulings, unless reversed, are fundamentally inconsistent with the finding of adequate representation in PTO 1415 by MDL 1203 and the Third Circuit, – a finding essential to the class certification and settlement. Unless latent PPH claims were asserted and adequately represented, the MDL Court could not have included latent PPH claimants in the class and could not have restricted how and when such claims could be prosecuted. This, of course, is why the issue is one properly and exclusively addressed to the MDL Court.

The trial court and Sixth Circuit decisions also conflict with the notice sent to potential class members, including Angela Montgomery. As MDL Judge Bartle described the notice:

> [T]he notice sent to class members in the spring of 2000 about the proposed settlement confirms our analysis... The words "Official Court Notice" in bold letters were imprinted on the front. **On page fourteen of the Guide was the statement "If you have a PPH claim, as defined in the Settlement Agreement, you**

> **may pursue that claim in court outside of this Settlement, whether or not you Opt-Out." Thus, class members were told that their rights to sue for a PPH claim would be the same whether or not they exercised an initial opt-out.**[10]

If the TSOR bars this action, the notice sent to Angela Montgomery was simply wrong and, worse, it was a trap, because the rights of Tennessee residents with latent PPH claims (and residents of other states with statutes of repose) were not the, "same whether or not they exercised an initial opt-out." If the TSOR would extinguish latent PPH claims as early as 2001, then the class notice for Tennessee residents should have read:

> **FOR TENNESSEE RESIDENTS, OPT OUT AND SUE. TENNESSEE'S STATUTE OF REPOSE (TENN. CODE ANN. § 29-28-103) WILL FOREVER BAR YOUR CLAIM IN A LITTLE MORE THAN A YEAR.**

The preclusion language in the class notice must be strictly construed against Wyeth and in favor of Angela Montgomery's right to pursue her individual claim. The Third Circuit noted, as recently as 2004:

> The decision of a potential settlement class member to remain with the class or to opt out

---

[10] *Brown v. Am. Home Prods. Corp. (In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.)*, MDL 1203, Civ. No. 99-20593, 2003 U.S. Dist. LEXIS 19846, *11-12 (E.D. Pa. Oct. 10, 2003) (emphasis added).

> entirely at the threshold is a fateful one.... By waiving an initial opt-out, the class member surrenders what may be valuable rights, in return for countervailing benefits. In this case, important information for these potential class members included the availability, benefits, and disadvantage [check quote—disadvantages?] of the intermediate opt-out right.
>
> This opt-out choice raises a significant issue of fairness. As in *Georgine v. Amchem Prods.*, the individual class members here have claims "that frequently receive huge awards in the tort system." 83 F.3d at 633. They can hardly knowingly waive some of their tort rights without a clear notice of what they are waiving.....
>
> **It follows that the preclusion language in the Diet Drugs class notice and settlement agreement must, in order to avoid due process concerns, be strictly construed against those who seek to restrict class members from pursuing individual claims. *Cf. United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) ("Statutes should be construed to avoid constitutional questions....").**

In re Diet Drugs, 369 F.3d 293, 308 (3rd Cir. 2004). (Emphasis added.)

Class members were enjoined from filing suit until they met the PPH definition. To hold that the TSOR bars a claim otherwise timely filed after the PPH definition is met creates a legal Catch-22 depriving

Petitioner of access to the courts. That unjust and irrational result can be remedied by holding that the TSOR time limits were satisfied through certification of the class in MDL 1203.

PPH claims were not "settled claims" under PTO 1415 and were not dismissed but remained subject to the continuing jurisdiction of the MDL Court.[11] The TSOR requires that an action "must be brought" within the specified time periods. This Court should hold that Petitioner's action was brought and thereafter preserved by the class certification and was subsequently pursued in the only way permitted by the Pretrial Orders of the MDL Court.[12]

---

[11] The order that approved the Class Settlement and "dismissed" the underlying complaint was designated as Pretrial Order No. 1415 in a series of sequentially numbered orders entered in MDL 1203. After the entry of Pretrial Order No. 1415, the MDL Court subsequently entered more than 6,000 additional pretrial orders as part and parcel of its continuing jurisdiction over the class action. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 453 (E.D. Pa. 2008).

[12] Were it not for the MDL Order precluding any action for PPH, Mrs. Montgomery could have taken steps to preserve any potential claim. Such steps could have included medical monitoring claims in a variety of jurisdictions, tolling agreements, etc. The National Settlement Agreement prohibited this, thereby creating the Catch-22 in the present action for class members like Petitioner, who lived in states that had statutes of repose that would require suit prior to the time allowed by the MDL Orders.

III. Affirming the Sixth Circuit's opinion will undermine the effectiveness of MDL courts in the future by making retained jurisdiction illusory.

The Sixth Circuit's assertion of jurisdiction, and its interpretation of the "Settlement Agreement" approved by the MDL Court and over which that latter Court retained continuing and exclusive jurisdiction has national implications that undermine the effectiveness and utility of MDL Courts. The entire MDL procedure is designed in part to avoid conflicting judicial rulings.[13] Allowing this "clash" of jurisdiction to stand will result in future uncertainty and reluctance on the part of defendants to globally resolve cases in the MDL Court. Likewise, it will encourage claimants to "opt-out" of global settlements for fear that some other court, unfamiliar with the details and nuances of the global MDL settlement may later hold their claims barred, or make other rulings that negate important rights established by a settlement agreement. In addition, the claim of exclusive jurisdiction by the MDL court will be seen as one that has no meaning.[14]

---

[13] 15. 28 U.S.C. § 1407(a) provides, in pertinent part:
When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

[14] See, e.g., DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL: PRACTICE BEFORE THE JUDICIAL PANEL ON

Whether the "Settlement Agreement" permits Wyeth's reliance on the TSOR is an issue that affects not only Angela Montgomery, but all Tennessee resident class members similarly situated (and class members from other states with statutes of repose) who were diagnosed with primary pulmonary hypertension ("PPH") after September 2, 2001, but who could not have filed an action before that date because they were precluded from doing so by the MDL Court. As such, the issue is not a case specific one, but one of general application. The MDL Court is the only one with the authority, background knowledge, and jurisdiction to make that determination. As noted in the 6th Circuit concurring opinion:

> [A]ny assessment of the timeliness of Montgomery's PPH claim necessitates an examination of the nationwide Class Action Settlement Agreement, approved by the Pennsylvania Court.
>
> ....
>
> Although it can be argued that Wyeth's motion is based on a statute unique to Tennessee, the

---

MULTIDISTRICT LITIGATION § 1.1, at 6 (2005) ("The Panel continues to be one of the most effective means of making it possible for federal courts to manage cases and accomplish the just and efficient resolution of civil actions."); Ostolaza & Hartmann, supra note 3, at 75 ("The MDL Statute has proven to be a useful procedural tool for [coordinating or] consolidating thousands of related cases pending in federal courts and has led to substantial judicial and party savings."); see also Geier, supra note 10 ("The panel's success in [centralizing] pretrial proceedings has helped to convince at least 15 states to create their own regimes for handling litigations.").

> primacy of the interpretation of the Settlement Agreement and PTO 1415 in resolving the issue is apparent. For this reason, Wyeth should have moved for summary judgment during the pretrial proceedings in Pennsylvania.

App. at 29a-30a.

The MDL Court retained exclusive jurisdiction to interpret and enforce the Settlement Agreement and related Orders. It did so in part to insure that the Settlement Agreement and Orders were uniformly interpreted and enforced in accordance with the intent of the parties and consistent with due process. The MDL Court therefore is the only court with jurisdiction to determine whether Angela Montgomery's rights to assert her PPH claims were indeed fully preserved or whether the TSOR can bar those claims for not being asserted at a time when the MDL Court precluded their assertion. The Tennessee District Court and the Sixth Circuit lacked subject matter jurisdiction to make that determination given the MDL Court's retained and exclusive jurisdiction.

CONCLUSION

This Petition should be granted.

Respectfully submitted,

D. Brian Rattliff
Christopher W. Goode
BUBALO, HIESTAND &
ROTMAN, PLC
9300 Shelbyville Road, Suite 215
Louisville, Kentucky 40222
Telephone: 502.753.1600
Facsimile: 502.753.1601

Counsel for Petitioner

APPENDIX

APPENDIX

Appendix A: Sixth Circuit Opinion/Judgment, dated August 28, 2009 ..... 1a

Appendix B: District Court Memorandum/ Order, dated March 19, 2009 ..... 36a

Appendix C: District Court Order, dated May 22, 2009 ..... 61a

Appendix D: Sixth Circuit Order denying rehearing, dated October 23, 2009 ..... 67a

Appendix E: U.S. Const. amend V 69a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-5701

[Filed August 28, 2009]

ANGELA MONTGOMERY, *Plaintiff-Appellant*,

v.

WYETH, fka American Home Products Corporation, AHP SUBSIDIARY HOLDING CORPORATION, fka Wyeth-Ayerst Laboratories Company; WYETH PHARMACEUTICALS, INC., fka Wyeth-Ayerst Pharmaceuticals, Inc., *Defendants-Appellees.*

Appeal from the United States District Court for the Eastern District of Tennessee of Chattanooga. No. 05-00323—Curtis L. Collier, District Judge.

Argued: January 14, 2009

Decided and Filed: August 28, 2009

Before: SUHRHEINRICH, GILMAN, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Gregory J. Bubalo, BUBALO, HIESTAND & ROTMAN, PLC, Louisville, Kentucky, for Appellant. Michael T. Scott, REED SMITH LLP, Philadephia, Pennsylvania, for Appellees. **ON BRIEF:** Gregory J. Bubalo, D. Brian Rattliff, BUBALO, HIESTAND & ROTMAN, PLC, Louisville, Kentucky, Gregory F. Coleman, COLEMAN & EDWARDS, PSC, Knoxville, Tennessee, for Appellant. Michael T. Scott, REED SMITH LLP, Philadephia, Pennsylvania, Samuel L. Felker, BASS, BERRY & SIMS, Nashville, Tennessee, for Appellees. Michael D. Fishbein, LEVIN, FISHBEIN, SEDRAN & BERMAN, Philadelphia, Pennsylvania, for Amicus Curiae.

SUHRHEINRICH, J., delivered the opinion of the court, in which GILMAN, J., joined. WHITE, J. (pp. 20-23), delivered a separate opinion concurring in the affirmance.

OPINION

SUHRHEINRICH, Circuit Judge. Plaintiff Angela Montgomery sued Defendants Wyeth, Wyeth Pharmaceuticals, Inc., a wholly owned subsidiary of Wyeth, and AHP Subsidiary Holding Corporation, also a subsidiary of Wyeth, after she developed primary pulmonary hypertension ("PPH"), a serious, debilitating, and usually fatal disease, from ingesting "Fenphen,"a combination diet drug therapy that included Defendant Wyeth's diet drug, Pondimin.[1] The

---

[1] Pondimin was Wyeth's trade name for fenfluramine. As explained by the district court in the multidistrict litigation:

Fenfluramine is an appetite suppressant that affects blood levels of the neurotransmitter, serotonin. Dexfenfluramine, the "d-isomer" of fenfluramine, is chemically related to fenfluramine and acts as an appetite suppressant by stimulating the release of serotonin from nerve cells in the brain and by reducing the reuptake of the released serotonin. In 1973, The United States Food and Drug Administration ("FDA") approved A.H. Robins, Inc.'s new drug application to market fenfluramine in the United States. . . .

Before 1989, A.H. Robins, Inc. was responsible for the marketing, sale and labeling of fenfluramine in the United States. In 1989, AHP acquired A.H. Robins. Following the acquisition, fenfluramine was marketed by AHP under the trade name "Pondimin." . . .

In 1992, a series of articles by Michael Weintraub, M.D., were published in the Journal of Clinical Pharmacology and Therapy, in which Dr. Weintraub advocated the use of fenfluramine together with the drug phentermine for weight loss management without the adverse side effects associated with the use of fenfluramine alone. This regimen popularly became known as "Fen-Phen." . . .

Dexfenfluramine, the chemical cousin of Pondimin, was developed by Les Laboratories Servier S.A. ("LLS") in France. The drug afforded the same anorexic effects as Pondimin without the need to add phentermine to ameliorate adverse side effects. Before 1994, the Lederle Division of American Cyanamid Company had the right, together with Interneuron Pharmaceuticals, Inc., to develop and promote dexfenfluramine in the United States under the trade name "Redux." In 1994, AHP acquired American Cyanamid. Following that acquisition, responsibility for the development and promotion of Redux in the United States in conjunction with Interneuron was assumed by AHP. Interneuron received approval to market Redux in the United States in mid-1996.

district court held that Montgomery's claim was barred by Tennessee's statute of repose, which requires that an action "be brought within one (1) year after the expiration of the anticipated life of the product." Tenn. Code Ann. § 29-28-103(a) ("TSOR").[2] Montgomery appeals.

I. Background

The FDA approved the sale of the Pondimin brand of fenfluramine 20 mg tablets as a prescription weight loss medication in 1973. Pondimin 20 mg tablets were manufactured in Richmond, Virginia, and distributed by Wyeth to pharmacies and wholesalers in 100-count and 500-count stock bottles. The expiration date for Pondimin 20 mg tablets was three years from the

---

In re Diet Drugs, Nos. 1203, 99-20593, 2000 WL 1222042, at *1 (E.D. Pa. Aug. 28, 2000) ("PTO 1415").

[2] The products liability statute of repose provides as follows:

> Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104, 28-3-105, 28-3-202 and 47-2-725, but notwithstanding any exceptions to these provisions it must be brought within six years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, *or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter*, except in the case of injury to minors whose action must be brought within a period of one (1) year after attaining the age of majority, whichever occurs sooner.

Tenn. Code Ann. § 29-28-103(a) (West 2008) (emphasis added).

month of manufacture of each lot. The expiration date was printed on a label affixed to each stock bottle. Wyeth did not sell Pondimin 20 mg tablets directly to consumers. Instead the tablets were packaged by third parties. The product was withdrawn from the market in September 1997.

Montgomery began taking Pondimin in 1997. A Tennessee resident, Montgomery traveled to the Med-X Clinic in Fort Oglethorpe, Georgia, to receive treatment and prescriptions of Pondimin, which was not available in Tennessee at that time. Montgomery received her first treatment in January 1997 and went to Georgia at least eight times during 1997. Each time, she was evaluated by a Georgia physician. She was prescribed, and purchased, Pondimin on seven of those visits. Montgomery saw three doctors: Dr. Merton Sure, who has since died; Dr. David Hargett, who lost his medical license in January 2001; and Dr. Joyce Gray.

Pondimin became available in Tennessee as of March 26, 1997. Wyeth voluntarily withdrew Pondimin from the market on September 15, 1997, and did not manufacture, package, or distribute it after that time. Montgomery stopped using Pondimin in August 1997.

In December 1997, the Judicial Panel on Multidistrict Litigation established MDL No. 1203 in the Eastern District of Pennsylvania for consolidated proceedings relating to a wave of litigation involving Pondimin, Redux, and phentermine. *See In re Diet Drugs*, Nos. 1203, 99-20593, 2000 WL 1222042, at *1 (E.D. Pa. Aug. 28, 2000) ("PTO 1415"). On October 7, 1999, the numerous parties to the action reached an

understanding of the principal terms of the settlement in a Memorandum of Understanding ("MOU"). *Id.* at *5. On October 12, 1999, a class action styled *Brown v. Wyeth* was filed on behalf of all users of Pondimin and Redux, in the Eastern District of Pennsylvania and became part of MDL 1203. *Id.*, at *19. Montgomery is a member of the *Brown* class. On November 18, 1999, the parties executed a Nationwide Class Action Settlement Agreement ("Settlement Agreement"), which included the *Brown* class members. On August 28, 2000, the district court entered PTO 1415, which certified the class and approved the Settlement Agreement. *See id.*

Montgomery was not diagnosed with PPH until April 2005. She filed the present action in Tennessee state court in October 2005, within six months after being diagnosed. The case was removed to the United States District Court for the Eastern District of Tennessee, transferred to the MDL for pretrial proceedings in February 2006, and then remanded to the district court in July 2007. Defendants moved for summary judgment, alleging that Montgomery's claim was barred by the TSOR because it had not been brought within one year of the expiration date of the product. The district court reluctantly agreed and granted summary judgment to Defendants on March 19, 2008. Specifically, the court concluded that the TSOR applied to Montgomery's claim under Tennessee's conflict-of-laws rules, the Settlement Agreement did not preserve her right to sue for PPH, Tennessee law rather than Georgia law applied, and Wyeth did not waive its statute of repose defense. *See Montgomery v. Wyeth*, 540 F. Supp. 2d 933 (E.D. Tenn. 2008). The court also denied Montgomery's Rule 59

motion to alter or amend judgment. This appeal followed.

II. Analysis

This Court reviews a district court's grant of summary judgment de novo. *Gribcheck v. Runyon*, 245 F.3d 547, 550 (6th Cir. 2001). Summary judgment is proper if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A. Choice of Law

Montgomery argues that the district court erred in applying Tennessee law because the relevant choice-of-law principles dictate that Georgia law should govern. As noted, the district court held that the TSOR barred Montgomery's claim. There is a conflict because Georgia's statute of repose, which limits claims only after ten years, would not bar her claim. *See* Ga. Code Ann. § 51-1-11 (West 2008) (stating that "[n]o action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury").

Because this is a diversity action, the law of the forum state, including the choice-of-law rules, apply. *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 302 (6th Cir. 2008). Tennessee follows the "most significant relationship" approach of the Restatement (Second) of Conflict of Laws to choice-of-law questions. *Hataway*

v. McKinley, 830 S.W.2d 53, 59 (Tenn. 1992). Under this approach, "the law of the state where the injury occurred will be applied unless some other state has a more significant relationship to the litigation." *Id.* at 59. [3] Tennessee adopted this position "because generally the law of the state where the injury occurred will have the most significant relationship to the litigation." *Id.* Thus, the most significant relationship "provides a 'default' rule whereby trial courts can apply the law of the place where the injury

---

[3] The Restatement provides:

> § 145 The General Principle
>
> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state, which with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

Hataway, 830 S.W.2d at 59 (quoting Restatement (Second) of Conflict of Laws § 145 (1971)).

> The relevant principles to consider are:
>
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability, and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Id. at 59 n.3 (quoting Restatement (Second) of Conflict of Laws § 6(2) (1971)).

occurred when each state has an almost equal relationship to the litigation." *Id.*

Contacts to be considered in determining which state has the most significant relationship include (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship, if any, between the parties is centered. *Id.* at 59 (quoting § 145(2)).

The district court analyzed these four factors. First, the court noted that the place of injury is not obvious when the injury is a latent disease, like PPH, and that there is no Tennessee law for determining where a latent injury is suffered. However, the court also noted that there was no indication that Montgomery suffered from PPH in Georgia. The court therefore concluded that because she developed her injury while living in Tennessee, her place of injury is Tennessee. The court reasoned that this conclusion was consistent with the language of Tennessee's product liability statute of limitations, which states that a cause of action accrues when a plaintiff suffers her injury, not when she purchases the product. *See* Tenn. Code Ann. § 28-3-104(b)(1). Second, the district court determined that the conduct causing the injury occurred in Georgia because Montgomery bought Pondimin from a clinic in Georgia. The court noted that the drug was prescribed by Georgia doctors, and that she signed a consent form with a Georgia clinic. Furthermore, the Georgia doctors allegedly relied on false information from Wyeth. Third, the district court observed that Montgomery lived in Tennessee during the relevant periods and that Wyeth is incorporated in Delaware

with its principal place of business in New Jersey. Lastly, the court determined that "the indirect relationship Plaintiff and Defendant had in Georgia weighs in favor of Georgia, but is weak." *See Montgomery v. Wyeth*, 540 F. Supp. 2d 933, 944 (E.D. Tenn. 2008).

Weighing these factors, the district court concluded that Tennessee had the most significant relationship because Tennessee was where Montgomery consumed the Pondimin and suffered her injury. By contrast, the only contact she had with Georgia was that she purchased the product from a third party there. *See id.* at 944-945.

On appeal, Montgomery claims that all the key events occurred in Georgia and that application of the TSOR does not promote any interest of the state of Tennessee. We agree with the district court that Tennessee has the most significant relationship to the parties and the occurrence at issue. Although it has not ruled on the issue of latent injury, the Tennessee Supreme Court has commented, in the context of adopting the discovery rule for malpractice actions, that where the "injury complained of, and the harmful effect thereof develops gradually over a period of time, the injury is 'sustained' . . . when the harmful effect first manifests itself and becomes physically ascertainable." *Teeters v. Curry*, 518 S.W.2d, 512, 517 (Tenn. 1974) (quoting *Layton v. Allen*, 246 A.2d 974, 978 (Del. 1968) (holding that a cause of action for medical malpractice accrues and the statute of limitations begins to run when the patient discovers or reasonably should have discovered the injury)). Further, based on the assertions in the complaint and evidence in the record, Tennessee has the most

significant relationship to the parties and the occurrence because Tennessee is where Montgomery sustained her injury, Tennessee is her place of domicile and residence, Tennessee is where she intended to and did use almost all of her Pondimin tablets, and Tennessee is the state where she was diagnosed and treated for her injury. Wyeth also conducted business in Tennessee, where Pondimin was expected to be used by customers like Montgomery, and where it was in fact sold during most of the time Montgomery used it.[4] *Cf. Trahan v. E.R. Squibb & Sons, Inc.*, 567 F. Supp. 505 (M.D. Tenn. 1983) (applying the *lex loci* approach, holding that Tennessee law rather than North Carolina law applied to the plaintiff's claim against the defendant manufacturer of DES, although the plaintiff's mother ingested the drug while pregnant in North Carolina, because the plaintiff moved to Tennessee, became pregnant, and was diagnosed with an incompetent cervix there).

Although Montgomery obtained Pondimin in Georgia, she received Pondimin from a third party. She took at most a few tablets there, and she does not claim to have suffered any symptoms in Georgia. None of the parties are current or former residents of Georgia. Montgomery alleges that her prescribing physicians received inadequate warnings from Wyeth

---

[4] Although Pondimin was banned for sale in Tennessee part of the time Montgomery was taking it, its *use* was always permitted. Tennessee residents were induced to obtain Pondimin through third-party advertising in Tennessee, and it was lawfully sold in at least 700 Tennessee pharmacies during most of the time Montgomery used it. It became legal to prescribe Fenphen in Tennessee on March 27, 1997, two months after Montgomery started taking Pondimin.

in Georgia. However, there is no support in the record that her prescribing doctors reviewed Wyeth's inadequate warnings, relied on any other statements made by Wyeth, or were uninformed about the risks of Pondimin when they prescribed it to Montgomery in 1997. Thus, Montgomery's relationship with Wyeth is more significant in Tennessee, the state where she actually used the manufacturer's product and suffered the resulting injury, rather than Georgia, the state where she obtained the product through a third party.

Montgomery claims that all of the wrongful acts were consummated in Georgia because she was not fully informed of the risks at the prescribing clinic. She claims that she relied on her prescribing doctors at the Med-X Clinic to know the risks of Pondimin and she signed a consent form at the clinic stating that such consent was necessary pursuant to Georgia law and also that her treating physicians were licensed to practice in Georgia. She further claims that Wyeth did not adequately inform these doctors about the risks of its drugs. In support, she provides the testimony of Dr. Leon Lane, M.D., the Medical Director of Med-X Clinic at the time of her treatment. Dr. Lane testified that its consent form was inadequate because it was based on Wyeth's 1996 labeling, which did not highlight the risks for VHD and PPH. She also points out that the 1996 Physicians Desk Reference ("PDR"), which was sent to the Med-X Clinic, mentioned only four reported cases of pulmonary hypertension worldwide associated with Pondimin use and no cases of PPH, despite the fact that Wyeth was aware of more than fifty cases of PPH by May, 1996.

However, Montgomery offers no proof that either Dr. Shure or Dr. Hargett reviewed Wyeth's warnings

or any other statements made by Wyeth. Dr. Lane did not provide any evidence about the information Drs. Shure or Hargett had about Pondimin, and he did not work at the clinic when Dr. Hargett first prescribed Pondimin to Montgomery in June 1997. Dr. Lane offered no evidence relating to the Pondimin labeling in effect when Montgomery was prescribed Pondimin in 1997. Dr. Lane's testimony about the clinic's consent form is irrelevant because it did not contain any statements made by Wyeth and he did not draft it. In short, this evidence does not establish that Georgia's contacts are more significant than Tennessee's.

Our decision in *In re Bendictin Litig.*, 857 F.2d 290 (6th Cir. 1988), does not help Montgomery. As the district court noted, *Bendectin* applied Ohio law under Ohio choice-of-law rules because the drug was manufactured in Ohio, where the manufacturer also maintained its principal place of business. Pondimin was manufactured in Virginia, and the Wyeth entities maintain their principal places of business in Pennsylvania and New Jersey. *Bendectin* does not support the proposition that Georgia law should apply simply because the product was sold there.

In further support of its conclusion that Tennessee law should apply, the district court applied the choice-of-law principles from § 6 of the Restatement (Second) Conflict of Laws:

> [T]he principles in the Restatement . . . suggest Tennessee law should apply. Plaintiff argues Tennessee has an interest in compensating its resident and Georgia has an interest in regulating a product sold in its state. But this argument fails. Tennessee's interest is not in

> compensating its resident for harm done to her. Such an interest may be a good idea, but that is a decision for the General Assembly, not the Court. The policy of Tennessee as exemplified through its statute of repose is that residents who suffer from diseases with long incubation or latency periods are not entitled to recover for harms done to them. Although this statute is designed to limit product liability costs for manufacturers and sellers, it is not inapplicable merely because the product was not purchased in Tennessee. Pondimin was sold for a short period of time in Tennessee, and PPH is not the only latent disease for which the legislature decided not to create an exception. To the extent Tennessee wants to protect Pondimin's manufacturers and sellers from product liability costs, the statute advances that goal. And while Georgia does have an interest in regulating a product sold there, Tennessee has an interest in regulating a product used here; it chooses to effect that interest by strictly limiting the time that actions can be brought.

Montgomery, 540 F. Supp. 2d at 945. The court further noted that, while not dispositive, the parties had already relied exclusively on Tennessee law. *Id.*

Montgomery claims that the district court failed to consider whether the TSOR, as applied to *this case*, outweighed "relevant policies of other states and the relative interests of those states in the determination of the particular issue." Restatement (Second) of Conflict of Laws §§ 6(b) and (c). *See also* Restatement (Second) of Conflict of Laws, § 145, cmt. c (stating that "the interest of a state in having its tort rule applied in

the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and by the relation of the state to the occurrence and the parties"). She also asserts that Tennessee has no interest in a claim that is barred by Tennessee law. Thus, Montgomery contends that, as applied to this case, the TSOR does not advance Tennessee's interest in controlling insurance rates. Further, she notes that numerous authorities have noted that statutes like the TSOR do not actually lower insurance premiums, including this Court in *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1140 (6th Cir. 1986) (acknowledging that the legislative goals of the TSOR are not likely to be accomplished by the means selected based on the views of various authorities).

The primary flaw in Montgomery's argument is that it focuses on the outcome of applying Tennessee's statute of repose rather than on the significance of Tennessee's relationship to the parties and the place of injury as required by *Hataway*. Tennessee's choice-of-law analysis does not turn on whether a plaintiff has a viable claim in one state but not another. *See* Restatement (Second) of Conflict of Laws § 145, cmt. c ("A rule which exempts the actor from liability for harmful conduct is entitled to the same consideration in the choice-of-law process as a rule which imposes liability"; *see also Smith v. Priority Transp., Inc.*, No. 02A01-9203-CV-00074, 1993 WL 29021, at *3 (Tenn. Ct. App. Feb. 9, 1993) (holding that Mississippi law applied to a Mississippi resident's claim for retaliatory discharge from his job in Mississippi for filing a worker's compensation claim even though Mississippi did not recognize such a claim and Tennessee did); *Cruz v. Ford Motor Co.*, 435 F. Supp. 2d 701, 707 (W.D. Tenn. 2006) (holding that Michigan law barring the

plaintiff's claim for punitive damages applied, even though Tennessee would have allowed it).

As the Tennessee Supreme Court has recognized, the Tennessee products liability statute of repose "was enacted as an important and specific measure to address products liability actions." *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 187 (Tenn. 2000); *see also Jones v. Five Star Eng'g Inc.*, 717 S.W.2d 882, 883 (Tenn. 1986) ("The statute in question was enacted after lengthy debates and full consideration by the General Assembly. In our opinion it represents a reasonable balancing of the conflicting interests and concerns with which the Legislature had to deal."). The preamble to Tennessee Products Liability Act ("TPLA") states:

> WHEREAS, The General Assembly finds and declares that the number of product liability suits and claims for damages and the amount of judgments, settlements and the expense of defending such suits have increased greatly in recent years, and because of these increases[,] the cost of product liability insurance was substantially increased.

Penley, 31 S.W.3d at 187 (quoting preamble). In *Penley*, the Tennessee Supreme Court explained:

> As the preamble to the TLPA indicates, the General Assembly perceived that uncertainty as to future liability increased the premiums for product liability insurance, which in turn increased the costs of production and ultimately consumer prices. The legislature considered the limitation of future liability to a reasonable and

> specific period to be one of the most important keys in solving the perceived products liability crisis.

Penley, 31 S.W.2d at 187.

We are not in a position to alter this policy decision of the state legislature. Indeed, this Court and the Tennessee Supreme Court have repeatedly upheld the constitutionality of the TSOR. *See Kochins*, 799 F.2d 1128; *Mathis v. Eli Lilly & Co.*, 719 F.2d 134 (6th Cir. 1983); *Hayes v. Gen. Motors Corp.*, No. 95-5713; 94 F.3d 644, 1996 WL 452916, *4 (6th Cir. Aug. 8, 1996) (unpublished per curiam); *Jones v. Five Star Eng'g, Inc.*, 717 S.W.2d 882 (Tenn. 1986); *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522 (Tenn. 1981); *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978); *see also Spence v. Miles Lab., Inc.*, 810 F. Supp. 952, 960-61 (E.D. Tenn. 1992), *aff'd*, 37 F.3d 1185 (6th Cir. 1994); *Stutts v. Ford Motor Co.*, 574 F. Supp. 100 (M.D. Tenn. 1983). And this Court has rejected the criticisms made by Montgomery. *See Kochins*, 799 F.2d at 1139-40 (recognizing that evidence in support of fact that the statute actually reduced the cost of product liability insurance was lacking, but noting a rational basis existed between the TSOR and goals expressed in the preamble). Montgomery's claim that liability is more likely to be determined on a national basis ignores the fact that assessing liability based on the laws of each state would obviously be part of that calculation. In short, as the district court held, Tennessee has a strong interest is applying its statute of repose in products liability actions, even when that forecloses a claim by a Tennessee plaintiff.

In sum, although Georgia has an interest because Montgomery was prescribed Pondimin there, we agree with the district court's conclusion that Tennessee has the stronger interest for the purpose of the choice-of-law analysis. *Cf. Lemons v. Cloer*, 206 S.W.3d 60 (Tenn. Ct. App. 2006) (holding that Georgia had the more significant relationship to bus accident that occurred in Tennessee since all of the children on the bus were Georgia residents from a Georgia school district, even though Tennessee emergency and medical personnel responded to the accident and injured parties were taken to Tennessee hospitals).

B. Class Action

Montgomery also contends that the district court erred in applying the TSOR to dismiss this action. She argues that the TSOR was satisfied because she made a claim "for injury to person or property" as a member of the *Brown* class, which was certified before the TSOR would have barred her claim. She further claims that the class included both diagnosed and latent PPH claims and claimants, and that the PPH claims were fully preserved and remained subject to the retained jurisdiction of the MDL court. Finally she notes that she was enjoined from bringing this action until she satisfied the settlement definition of PPH and could not have filed this action any earlier.

Montgomery was a member of the *Brown* class, which was approved for settlement by the court responsible in MDL 1203. This class was certified to include "All persons . . . who ingested Pondimin." Upon settlement, the MDL court dismissed the class action, so the case is no longer pending. *See In re Diet Drugs*, PTO 1415, 2000 WL 1222042, at *71 (stating that

"[t]he court hereby dismisses, with prejudice . . . the Third Amended Complaint in this action"). However, the *Brown* Class complaint expressly stated that PPH claims were not being asserted. The paragraph that defines the class clearly provides that "[t]he proposed class and subclasses do not include any claims based upon a diagnosis by a qualified physician of primary pulmonary hypertension ("PPH") suffered by a diet drug recipient."

The Settlement Agreement also expressly states that it does not include claims based on PPH: "Notwithstanding the foregoing, Settled Claims do not include claims based on PPH." *In re Diet Drugs*, PTO 1415, 2000 WL 1222042, at *31 (stating that "[u]nder the Settlement Agreement, claims based on PPH, including claims for compensatory, punitive, exemplary or multiple damages based on PPH are not 'settled claims'"); *In re Diet Drugs*, MDL 1203, NO. 04-23744, 2006 WL 1050289, at *1 (E.D. Pa. April 20, 2006) (stating that "[t]he Settlement Agreement exempts from the definition of 'settled claims' those claims based on PPH and allows a class member with this condition to sue Wyeth in the tort system").

At the same time, the Settlement Agreement "fully preserves" the rights of persons who have or develop PPH to sue. *See In re Diet Drugs*, PTO 1415, 2000 WL 1222042, at *31. The Settlement Agreement defines PPH, and limits a plaintiff from suing until she meets that definition.

Section VIII.B.1 of the Settlement Agreement, and PTO 1415, ¶ 11, retain the district court's continuing and exclusive jurisdiction over the action, including Defendants and the class members, to administer,

supervise, interpret, and enforce the settlement in accordance with its terms and to enter such orders as necessary. *See In re Diet Drugs,* PTO 1415, 2000 WL 1222042, at *72, ¶ 11. PTO 2383, entered on February 26, 2002, authorizes the district court to enforce PTO 1415, including but not limited to injunctive relief against any Class Member who has asserted a claim based on PPH, but whose medical condition does not meet the criteria set out in the Settlement Agreement.

The Settlement Agreement bars Wyeth from asserting a limitations defense "unless and until the condition of the Class Member meets the definition of PPH set forth" in the Settlement Agreement. The Settlement Agreement expressly provides:

> For purposes of any statute of limitations or similar time bar, the AHP Released Parties shall not assert that a Class Member actually had PPH unless and until the condition of the Class Member meets the definition of PPH set forth in Section I.46.
>
> In the event that a Class Member initiates a claim based on PPH, the AHP Released Parties shall not assert a defense based on "splitting" of claims, causes of action and/or parties by virtue of the fact that the Class Member is included in the Settlement, but the claim based on PPH is not a Settled Claim.

The first facet of Montgomery's argument–that any claim will suffice to preserve the cause of action–is unpersuasive. In requiring that an "action against the manufacturer . . . of a product for injury to person . . . caused by its defective or unreasonably dangerous

condition" be "brought" within a certain time, § 29-28-103 does not suggest that *any* action against the manufacturer brought within the statute of repose preserves the ability to claim *different* injuries in the future. *See* Tenn. Code Ann. § 29- 28-103. The straightforward reading of § 29-28-103 requires that an action for the injury for which a plaintiff seeks to recover be brought within the statute of repose.

Cronin v. Howe, 906 S.W.2d 910 (Tenn. 1995), does not support Montgomery's argument. In *Cronin*, the plaintiff's medical malpractice claim was timely filed and then dismissed without prejudice before it was refiled under the Tennessee savings statute, § 28-1-105(a) (providing that if an action is filed within the statute of limitations and a judgment of dismissal entered on any ground not concluding the right of action, the action may be refiled within one year of the dismissal). Under those circumstances, the Tennessee Supreme Court held that the applicable statute of repose did not bar the plaintiff's claim. Here, however, Montgomery did not file her PPH claim within the statute of repose, *cf. id.* at 914, and she did not refile her claim following dismissal of the initial action within the one-year period allowed by any savings statute. *Cf. id.* at 911. In short, Montgomery never filed a timely claim for PPH and no savings statute is applicable. Although her class action claim was based on the use of Pondimin, the harm asserted was not PPH. She did not file that claim until 2005.

The second facet of Montgomery's argument–that the Settlement Agreement preserved her PPH claim–is also unpersuasive. As noted above, the Settlement Agreement expressly excludes claims for PPH. Thus, the Settlement Agreement did not purport to dismiss

PPH claims because they were never asserted in the first place. Instead, the Settlement Agreement left the PPH claims unsettled and created limitations upon the defendants' ability to raise certain defenses when those claims were presented. While it precluded Wyeth from raising "statute of limitations or similar" defenses, or claim preclusion, it did not bar Wyeth from raising the statute of repose. By contrast, elsewhere, for those class members exercising certain opt-out rights and asserting valvular heart disease claims, the Settlement Agreement prevents Wyeth from asserting "any defense based on any statute of limitations or repose, the doctrine of laches, or any other defense predicated on failure to timely pursue the claim." As the district court noted, it is apparent that the drafters of the Settlement Agreement knew how to bar a statute of repose defense, but obviously did not include such a provision with respect to PPH claims. Thus, the Settlement Agreement limits Wyeth's ability to raise a statute of limitations defense or to claim that a Class Member actually had PPH such that her subsequent claim would be precluded, but it does not bar Wyeth from raising the statute of repose.[5]

Montgomery also complains that the Settlement Agreement prevented her from bringing a PPH claim

---

[5] Assuming that the Nationwide Settlement Agreement did not exist, any claim under Tennessee law relating to the use of Pondimin would be barred unless brought by September 2001. Had Montgomery opted out of the *Brown* class, she still would have had to comply with Tennessee's statute of repose. Had she opted out by the March 2000 deadline and brought suit after her diagnosis in 2005, her claim would still be barred by the statute of repose.

before she had a confirmed PPH diagnosis as defined in the Settlement Agreement. However, as the district court explained:

> That definition is a contractual provision in a freely-negotiated settlement about which all class members had notice and an opportunity to object. *In re Diet Drugs, MDL 1203 PTO 2623*, 2002 U.S. Dist. LEXIS 20323, *11 (E.D.Pa. Oct. 8, 2002). The settlement agreement gives class members with PPH "a right to the full and complete relief allowed by law." *In re Diet Drugs, MDL 1203 PTO 3085*, 2003 WL 22669132, *1, 2003 U.S. Dist. LEXIS 20221, *16 (E.D.Pa. Oct. 24, 2003). The problem for Plaintiff is the settlement agreement cannot change Tennessee substantive law. *See In re Diet Drugs, PTO 2623*, 2002 U.S. Dist. LEXIS 20323 at * 13 ("Any PPH claim, of course, will be subject to the substantive law and evidentiary and procedural rules of the place where the claim is being litigated.").
>
> Plaintiff complains the settlement agreement prevented her from asserting her PPH claim until the PPH definition was met. The parties contractually agreed as to the administration of PPH claims, but could not create a substantive claim that is barred by Tennessee law. Furthermore, the PPH definition was articulated by leading medical experts and has never been challenged as inaccurate. *In re Diet Drugs, PTO 3085*, 2003 WL 22669132, at *2, 2003 U.S. Dist. LEXIS 20221 at *17; *In re Diet Drugs, PTO 2623*, 2002 U.S. Dist. LEXIS 20323 at *11. "If anything, the

> definition is more generous to claimants than it might otherwise have been." *In re Diet Drugs, PTO 3085*, 2003 WL 22669132 at *2, 2003 U.S. Dist. LEXIS 20221 at * 17. Therefore, the settlement agreement is not what prevented Plaintiff from asserting her right to sue for PPH. The prohibition is that she developed PPH after the statute of repose period.

Montgomery, 540 F. Supp. 2d at 941. Although the result is harsh in this case, it derives from both the contractual arrangements of the nationwide Settlement Agreement and the state law of Tennessee, namely the severe one-year statute of repose for products liability actions. It did not result from any legal error by the district court.

C. Expiration Date

Montgomery also claims that the district court misapplied the TSOR because there were no expiration dates on the product dispensed to her. Defendants acknowledge that Montgomery did not get the pills in their original packaging because they were repackaged by the distributor who bought them from Wyeth and sold them to Montgomery.

The "anticipated life of the product" is the "expiration date placed on the product by the manufacturer when required by law but shall not commence until the date the product was first purchased for use or consumption." Tenn. Code Ann.

§ 29-28-102.[6] As the district court observed, Wyeth stopped manufacturing Pondimin on September 2, 1997. Wyeth offered uncontested evidence that packaging for Pondimin contained the expiration dates as required by law, and those expiration dates were three years from the date of manufacture. Thus, the expirations were at the latest September 2000. Montgomery filed this case in October 2005. Because the undisputed evidence establishes that all Pondimin tablets had an expiration date of five or more years before Montgomery brought this suit, there is no genuine issue of material fact as to the expiration date for purposes of applying the TSOR.

Contrary to Montgomery's assertion, the TSOR does not require that the purchaser have knowledge of the expiration date, but conditions the anticipated life of the product on the expiration date imposed by the manufacturer. This reading of the statute is consistent with the legislative intent. As this Court has noted, the statute of repose operates when "parties may be ignorant about the particular time limitations involved. Thus, a delay, even without knowledge of the hazard involved in the delay, may preclude the bringing of an otherwise meritorious claim." *Mathis*, 719 F.2d at 140 (holding that the application of ten-year limitation in TSOR does not violate a party's due

---

[6] Tenn Code Ann. § 29-28-102 provides in pertinent part:

(1) "Anticipated life." The anticipated life of a product shall be determined by the expiration date placed on the product by the manufacturer when required by law but shall not commence until the date the product was first purchased for use or consumption[.]

Tenn. Code Ann. § 29-28-102 (West 2008).

process rights). However harsh the result, this is a decision of the Tennessee legislature. "Statutes of limitation find their justification in necessity and convenience rather than logic. . . . They represent a *public policy* about the privilege to litigate." *Id.* (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

Our decision in *Spence v. Miles Lab.*, 37 F.3d 1185 (6th Cir.1994), is virtually identical. There we held the product liability claim was barred by the statute of repose because the expiration date on a package of blood (which was infected with AIDS and was transferred to the plaintiff) was June 5, 1987, and the plaintiff had filed his product liability claim more than one year after that date, despite the fact that he filed his action less than one year after discovering he had AIDS. *Id.* at 1188, 1190. As the district court held, *Spence* controls the result in this case.

D. Waiver

Last, Montgomery contends that the district court erred in finding that Defendants had not waived their statute of repose defense. Montgomery argues that Defendants did not raise it in their Answer and waited more than thirty-two months after the action was filed to assert it.

The district court ruled that Defendants sufficiently pleaded the statute of repose defense because their Answer states that "Plaintiff's causes of action are barred in whole or in part by the applicable statutes of limitations and repose," and their affirmative defenses include the "defenses of the Tennessee Products Liability Act of 1978, as codified in

[Tenn. Code Ann.] §§ 29-28-101 through 108." (Court File No. 8, pp. 2 & 32).

We agree. The Federal Rules of Civil Procedure do not require a heightened pleading standard for a statute of repose defense. Rule 8(b)(1) provides generally that "[i]n responding to a pleading, a party must . . . state in short and plain terms its defenses to each claim." Rule 8(d)(1) requires that averments in pleadings be "simple, concise, and direct," and that "[n]o technical form is required." Fed. R. Civ. P. 8(b)(1). *Cf. Conley v. Gibson*, 355 U.S. 41, 47 (1957) (stating that a plaintiff must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"). It also states that a party may state as many defenses as it has, regardless of consistency. Fed. R. Civ. P. 8(d)(3).

The averments cited above satisfy this standard. The TSOR is codified at subsection 29-28-103, and is plainly one of the defenses asserted. Thus, it cannot be said that Wyeth waived the defense when it both presented it in its Answer and then filed its motion for summary judgment before the dispositive motion deadline.[7]

---

[7] As noted by the district court, even if Defendants had not relied on the statute of repose in their answer, the TSOR was probably not a waivable affirmative defense under Tennessee law. Although federal law governs procedural rules, including when waiver occurs, state law defines the nature of defenses. *Roskam Baking Co., Inc. v. Lanham Mach. Co.*, 288 F.3d 895, 901 (6th Cir. 2002). The Tennessee Supreme Court has held that, unlike a statute of limitations, a statute of repose is substantive rather than procedural. A statute of limitations nullifies a party's remedy, but a statute of repose extinguishes both the right and the remedy.

III. Conclusion

For the foregoing reasons, as well as those in the district court's thorough and thoughtful opinion, the judgment of the district court is **AFFIRMED**.

CONCURRING IN THE AFFIRMANCE

WHITE, Circuit Judge, concurring. Reluctantly, I concur in the affirmance. I write separately to further address the Multidistrict Litigation (MDL) settlement (Settlement Agreement), and to observe that the Eastern District of Pennsylvania would have been much better suited to decide this motion.

As the majority explained, the Judicial Panel on Multidistrict Litigation (JPML) established MDL 1203 in the Eastern District of Pennsylvania. The instant case was initially transferred to the MDL court and that court oversaw pretrial proceedings in this case before remanding it back to the Eastern District of Tennessee in July 2007. On January 14, 2008, Wyeth moved for summary judgment based on the Tennessee statute of repose (TSOR). In addition to her arguments

---

See Cronin, 906 S.W.2d at 913 (agreeing that statutes of repose are substantive as opposed to procedural). However, as the district court also noted, in 2006, Tennessee Rule of Civil Procedure 8.03 was amended to add the statute of repose as an affirmative defense that must be pleaded in an answer. *Cf. Roskam*, 288 F.3d at 902 (concluding that Michigan's statute of repose for product liability actions was substantive rather than procedural; noting that the Michigan Court Rules do not include statute of repose in nonexhaustive list of affirmative defenses). As the district court also noted, because Defendants' answer asserted the statute of repose, we need not decide whether Tenn. R. Civ. P. 8.03 would apply retroactively. *See Wyeth*, 540 F. Supp. 2d at 942 n.7.

that Wyeth had waived the TSOR defense by failing to timely assert it and that Georgia law should apply, Montgomery argued that her PPH claim was preserved by the MDL and Settlement Agreement.

Montgomery was a plaintiff in the MDL.[1] The complaint in that action was filed within the time allowed by the TSOR. While PPH claims were not "settled claims," they were clearly part of the litigation until settlement, and the MDL court expressly exercised jurisdiction over those claims in approving the settlement.[2] Further the Settlement Agreement defined PPH and addressed the rights of PPH claimants. Thus, any assessment of the timeliness of Montgomery's PPH claim necessitates an examination of the nationwide Class Action Settlement Agreement, approved by the Pennsylvania court.

Both the Settlement Agreement and Pretrial Order (PTO) 1415 state that the Eastern District of Pennsylvania "retains continuing and exclusive jurisdiction over this action and each of the Parties . . . to administer, supervise, interpret and enforce the Settlement in accordance with its terms." *In re Diet*

---

[1] The Settlement Class included "All persons . . . who ingested Pondimin and/or Redux" except those whose claims had previously been resolved through litigation or settlement. (ROA, Vol. 6, at 1028.)

[2] Pretrial Order 1415 stated: "The court has jurisdiction over the subject matter of this action with respect to all claims, and has jurisdiction over all parties to this action, including all members of the settlement class and subclasses defined below." *In re Diet Drugs*, Nos. 1203, 99-20593, 2000 WL 1222042, at *69 (E.D. Pa. Aug. 28, 2000).

Drugs, Nos. 1203, 99-20593, 2000 WL 1222042, at *72 (E.D. Pa. Aug. 28, 2000). Although it can be argued that Wyeth's motion is based on a statute unique to Tennessee, the primacy of the interpretation and effect of the Settlement Agreement and PTO 1415 in resolving the issue is apparent. For this reason, Wyeth should have moved for summary judgment during the pretrial proceedings in Pennsylvania. *See Humphreys v. Tann*, 487 F.2d 666, 667-68 (6th Cir. 1973) (holding that a MDL transferee court has authority to hear motions for summary judgment as part of pretrial proceedings); *United States ex rel. Hockett v. Columbia / HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 38 (D. D.C. 2007) (noting that the transferee court's "familiarity with the issues in this case – a case which by now encompasses a voluminous docket – as well as the many related issues in the other cases in this MDL, indicates that it would be much more efficient to proceed to summary judgment motions in this Court rather than to ask the transferor court to play catch-up"); *Kaiser Indus. Corp. v. Wheeling- Pittsburgh Steel Corp.*, 328 F. Supp. 365, 370-71 (D. Del. 1971) (looking at the relevant legislative history and concluding that Congress intended "to grant to the transferee district court under §1407 the power to pass upon all pretrial motions including motions to dismiss, motions for judgment on the pleadings, or motions for summary judgment"); *see also* 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . ."). *But cf. In re Accutane Prods. Liab. Litig.*, 560 F. Supp. 2d 1370, 1370-71 (J.P.M.L. 2008) (vacating a transfer order that would consolidate the case as part of a MDL because

the pending motion for summary judgment involved issues of state law unique to the plaintiff).

In opposing Wyeth's motion for summary judgment, Montgomery asserted that her PPH claim was preserved by the commencement of the MDL and also by the Settlement Agreement. While the former assertion is easily addressed as a pure question of Tennessee law, the latter requires an interpretation of the Settlement Agreement in light of the MDL proceedings.

Regarding the former assertion, I do not agree with the majority that the MDL did not commence an action within the TSOR. As stated above, Montgomery was a member of the class, the action was brought within the TSOR, and the court expressly exercised jurisdiction over all claims. The fact that PPH claims were not settled does not alter these facts. Nevertheless, I cannot agree with Montgomery's essential assertion that the PPH claims were pending before the Eastern District of Pennsylvania after the dismissal of the MDL. While the MDL court retained jurisdiction to "administer, supervise, interpret and enforce" the Settlement Agreement, such jurisdiction was retained "[w]ithout affecting the finality of this Final Order and Judgment in any way," and PTO 1415 dismissed the Third Amended Complaint. *In re Diet Drugs*, Nos. 1203, 99-20593, 2000 WL 1222042, at *71-72. Thus, unless the Settlement Agreement itself preserved Montgomery's claim, it is barred because it was not re-filed within the TSOR.

In opposing application of the TSOR to bar her claim, Montgomery argued that under the Settlement Agreement 1) PPH claims were expressly preserved for

future litigation; 2) Wyeth agreed not to assert the statute of limitations defense or argue that a plaintiff split her claims; and 3) any conclusion otherwise would conflict with the class notice she received. Montgomery argues that the class notice led PPH plaintiffs to believe that if they satisfied the agreed-upon definition of PPH, their rights would be unaffected by the Settlement Agreement. However, the Settlement Agreement barred PPH plaintiffs from bringing a claim until they satisfied the definition of PPH contained therein, which, in Montgomery's case, was after the TSOR ran. Therefore, the only way Montgomery's claim remains unaffected by the Settlement Agreement, as represented in the class notice, is if the Agreement is interpreted to bar Wyeth's assertion of the TSOR defense. Montgomery further argued that the intent of the MDL was to treat all cases uniformly, settle non-PPH claims, and preserve PPH claims for future litigation under an agreed-upon definition, in exchange for which Wyeth agreed not to assert a time bar.

All these arguments are plausible, and the MDL court might have agreed with one or all of them. In any event, on this record, neither the district court nor this court is in a position to put the gloss on the Settlement Agreement that Montgomery urges upon us, because such a gloss is rooted in the context, rather than the language, of the Settlement Agreement. On the other hand, the MDL court would have been within its retained authority to do so.

While Montgomery complained below that Wyeth "inexplicably failed" to make "its motion while this action was pending in the MDL," she never asked the court to transfer the case back to the MDL court for

interpretation of the Settlement Agreement, nor has she argued on appeal that the district court erred in failing to do so, or in interpreting the Settlement Agreement itself. I am therefore constrained to concur in the affirmance.

Lastly, I do not agree with the majority's conclusion that "Montgomery's relationship with Wyeth is more significant in Tennessee," and agree with the district court's determination that that relationship was centered in Georgia. Nevertheless, I also agree with the district court's conclusion that the Tennessee courts would apply the TSOR because Montgomery consumed the Pondimin and suffered her injury in Tennessee.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-5701

[Filed August 28, 2009]

ANGELA MONTGOMERY, Plaintiff - Appellant,	)
v.	)
WYETH, fka American Home Products Corporation, AHP SUBSIDIARY HOLDING CORPORATION, fka Wyeth-Ayerst Laboratories Company; WYETH PHARMACEUTICALS, INC., fka Wyeth-Ayerst Pharmaceuticals, Inc., Defendants - Appellees.	)

Before: SUHRHEINRICH, GILMAN, and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

No. 1:05-CV-323

[Filed March 19, 2009]

ANGELA MONTGOMERY,	)
	)
Plaintiff,	)
	)
v.	)
	)
WYETH, f/k/a American Home Products Corp., AHP SUBSIDIARY HOLDING CORPORATION, f/k/a Wyeth-Ayerst, Laboratories Company; WYETH PHARMACEUTICALS, INC., f/k/a Wyeth-Ayerst Pharmaceuticals, Inc.,	)
	)
Defendants.	)

Chief Judge Curtis L. Collier

MEMORANDUM

Rarely does this Court suggest that a legislative body reconsider one of its enactments. The Court believes its role is simply to apply the law applicable to

the case before it and not concern itself with the merits of the case. However, because of the result in this case, this is one of those rare cases where the Court believes it is appropriate to urge the Tennessee legislature to look closely at the law governing this case.

Plaintiff Angela Montgomery ("Plaintiff") alleges she used the diet drug Pondimin in 1996 and 1997. According to Plaintiff, Pondimin caused her to develop Primary Pulmonary Hypertension, a progressive, fatal disease, in 2005. Later that year, she filed this product liability case against Pondimin's manufacturer, defendant Wyeth ("Defendant").[1] Invoking a rarely-used provision in Tennessee's product liability statute of repose, Defendant moved for summary judgment, claiming Plaintiff's case was untimely (Court File Nos. 83). The Court has considered the briefs filed by Defendant (Court File Nos. 84, 101 & 107) and Plaintiff (Court File Nos. 98 & 106). As explained below, the statue of repose eliminated Plaintiff's cause of action before it accrued, and therefore Defendant's motion for summary judgment will be **GRANTED** (Court File No. 83).

I. BACKGROUND

Plaintiff was an overweight but healthy woman when she began taking Pondimin, a diet drug manufactured, licensed, marketed, and detailed by Defendant. She took Pondimin for over 90 days in 1996 and 1997. Pondimin, which was made from a combination therapy of fenfluramine and phentermine,

---

[1] Two related companies are also defendants. The defendants collectively refer to themselves as Wyeth.

known as "Fenphen," was withdrawn from the market in September 1997, and the Food and Drug Administration found it to be unsafe.

In 2005, Plaintiff was diagnosed with Primary Pulmonary Hypertension ("PPH"), a rare, progressive, debilitating, and fatal disease affecting the heart and lungs. She alleges Pondimin caused her to develop PPH. Defendant allegedly knew of the dangers of Pondimin since at least 1995 but downplayed and concealed evidence of serious side effects and opposed putting prominent black box warnings on the drug. Plaintiff contends it is widely accepted Pondimin causes PPH, including latent PPH. Defendant does not deny Pondimin can cause PPH, but denies it caused PPH in Plaintiff.

Plaintiff filed this case in state court in October 2005, and it was removed to this Court in November 2005 (Court File No. 1). The case was transferred to a Multi-District Litigation ("MDL") court for pretrial proceedings in February 2006 (Court File No. 11) and remanded to this Court in July 2007 (Court File No. 14). After the parties had fully briefed Daubert motions regarding expert witnesses, Defendant filed its summary judgment motion.

II. STANDARD OF REVIEW

Summary judgment is proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

First, the moving party must demonstrate no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir. 2003). The Court views the evidence, including all reasonable inferences, in the light most favorable to the non-movant. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). However, the non-movant is not entitled to a trial based solely on its allegations, but must submit significant probative evidence to support its claims. *Celotex*, 477 U.S. at 324; *McLean v. Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). The moving party is entitled to summary judgment if the non-movant fails to make a sufficient showing on an essential element for which it bears the burden of proof. *Celotex*, 477 U.S. at 323. In short, if the Court concludes a fair-minded jury could not return a verdict in favor of the non-movant based on the record, the Court may enter summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

III. DISCUSSION

A. The Product Liability Statute of Repose

Defendant contends Plaintiff's complaint is barred by Tennessee's product liability statute of repose. Plaintiff's case is based on personal injury resulting from a product, and therefore is a product liability action as defined in the product liability statute, Tenn. Code Ann. § 29-28-102(6). The product liability statute of repose states:

> Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104 [etc.], but notwithstanding any exceptions to these provisions, it must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, or *within one (1) year after the expiration of the anticipated life of the product*, whichever is the shorter . . .

§ 29-28-103 (emphasis added). The "anticipated life of the product" is the "expiration date placed on the product by the manufacturer when required by law but shall not commence until the date the product was first purchased for use or consumption." § 29-28-102.[2]

Defendant stopped manufacturing Pondimin on September 2, 1997 (Court File Nos. 84-4, p. 2 & 84-6). Defendant's evidence establishes that the packaging for Pondimin contained expiration dates as required by law, and those expiration dates were three years from the date of manufacture (Court File No. 84-4 p. 2); 21 C.F.R 201.17; 21 C.F.R. 211.137. In an affidavit, Plaintiff states neither the pills she purchased nor the

---

[2] The statute of repose contains exceptions for minors and for actions resulting from asbestos or silicone gel breast implants. Tenn. Code Ann. § 29-28-103(a) and (b). Courts have refused to add other exceptions. *Winningham v. Ciba Geigy Corp.*, No. 97-5777, 1998 WL 432472, 1998 U.S. App. LEXIS 16388 (6th Cir. July 14, 1998); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 184-85 (Tenn. 2000).

bottle containing the pills had an expiration date (Court File No. 98-12, ¶ 7). Defendant acknowledges Plaintiff did not get the pills in their original packaging because they were re-packaged by the distributor who bought them from Defendant and sold them to Plaintiff. However, this cannot create a genuine issue of material fact. The law required the manufacturer to place an expiration date on the product based on stability testing. Defendant did place expiration dates on the product, even if the packaging of that product was different than what Plaintiff eventually received, and those expirations were at the latest September 2000.[3] Plaintiff filed this case in October 2005 after being diagnosed with PPH earlier that year. Therefore, Defendant contends the statute of repose bars Plaintiff's claim because it was filed after September 2001.

This Court is bound by *Spence v. Miles Lab.*, 37 F.3d 1185 (6th Cir. 1994), which upheld a decision from this district granting summary judgment to a products liability defendant. The court held the product liability claim was barred by the statute of repose because the expiration date on a package of blood (which was infected with AIDS and was transferred to the plaintiff) was June 5, 1987, and the plaintiff had filed his product liability claim more than one year after that date. *Id.* at 1190. Specifically, he

---

[3] Plaintiff asserts some of the Pondimin Defendant sold was imported from Europe, but the evidence shows some fenfluramine, a component of Pondimin, was purchased there (Court File No. 98-17). Defendant states that although some fenfluramine was purchased in Europe, all Pondimin was manufactured and packaged in the United States (Court File No. 102-7).

had filed his action in 1991, less than one year after discovering he had AIDS. *Id.* at 1188.

Although the anticipated life provision has been part of the statute of repose for the statute's entire three decades of existence, aside from *Spence* there is only one other case applying the anticipated life provision. In that case, an MDL court applying Tennessee law dismissed the plaintiffs' claims because they were filed more than one year after the expiration date of the drugs at issue. *In re Vioxx Prods. Liab. Litig.*, No. 07-1259, 2007 WL 3353404, *4, 2007 U.S. Dist. LEXIS 83709, *14-*15 (E.D. La. Nov. 8, 2007).

Although there are only two decisions applying the anticipatory life provision of the statute of repose, there are numerous decisions applying the statute's alternate provision requiring a case be "brought within ten (10) years from the date on which the product was first purchased for use or consumption." § 29-28-103.[4] Those decisions have held the statute of repose bars claims even if they would otherwise be permitted by the statute of limitations because the time period in the statute of repose is superimposed on the statute of limitations. *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 185 & 187 (Tenn. 2000); *Wyatt v. A-Best Prods. Co.*, 924 S.W.2d 98, 104 (Tenn. Ct. App. 1995); *Milligan v. American Hoist & Derrick Co.*, 622 F. Supp. 56, 58 (M.D. Tenn. 1985). The Tennessee Supreme Court has explained:

---

[4] Although the Tennessee courts have never applied the anticipatory life provision in a reported decision, the Tennessee Supreme Court has noted in dicta that it would "presumably" bar claims just like the alternative 10-year period. *Penley*, 31 S.W.3d at 185 n.3.

> Statutes of repose operate differently than statutes of limitation, primarily because statutes of repose typically begin to run with the happening of some event unrelated to the traditional accrual of the plaintiff's cause of action. Because a plaintiff's cause of action can be eliminated by a statute of repose even before it accrues, statutes of repose have been said to extinguish both the right and the remedy. The courts of this state have construed statutes of repose as an absolute time limit within which actions must be brought, and this Court has characterized the statute of repose as an outer limit or ceiling superimposed upon the existing statute of limitations . . . Where the injury occurs within the [repose] period, and a claimant commences his or her action after the [repose] period has passed, an action accrues but is barred. Where the injury occurs outside the [repose] period, no substantive cause of action ever accrues, and a claimant's actions are likewise barred.

Penley, 31 S.W.3d at 184 (internal quotation marks and citations omitted).

Plaintiff complains applying the statute of repose would bar her claim before she could file it. A cause of action for personal injury does not accrue until a plaintiff knows or reasonably should know an injury has been sustained, which is known as a discovery rule. *Wyatt v. ACandS, Inc.*, 910 S.W.2d 851, 854 (Tenn. 1995). Therefore, when a plaintiff does not discover (and could not have reasonably discovered) her injury until after the statute of repose period, the cause of action never accrues. *See Murphy v. Owens-*

Corning Fiberglas Corp., No. 96-6455, 1997 WL 705185, 1997 U.S. App. LEXIS 30530 (6th Cir. Nov. 4, 1997) (quoting *Cantrell v. Buchanan*, 1989 WL 25598,*1, 1989 Tenn. App. LEXIS 237 (Tenn. Ct. App. Mar. 22, 1989) (applying Tennessee's medical malpractice statute of repose) ("[the statute of repose] bars the plaintiffs' right to seek redress before they even knew about the injury. Despite the harshness of this result, this court cannot simply abrogate the legislature's enactment.")); *Wayne v. Tennessee Valley Authority*, 730 F.2d 392, 401 (5th Cir. 1984) (applying Tennessee's product liability statute of repose) ("Because the date of injury is not a factor used in computing the running of the time period, and such statutes typically do not have tolling provisions, the statutes acquire a substantive nature, barring rights of action even before injury has occurred if the injury occurs subsequent to the prescribed time period.").

In enacting the statute of repose, the Tennessee General Assembly sought "to provide a reasonable time within which action may be commenced against manufacturers and/or sellers while limiting the time to a specific period of time for which product liability insurance premiums can be reasonably and accurately calculated." *Penley*, 31 S.W.3d at 187 (quoting 1978 Tenn. Pub. Acts ch. 703 preamble). Courts have consistently rejected due process and other constitutional challenges to the statute. *E.g.*, *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1135 (6th Cir. 1986); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 136 (6th Cir. 1983); *Spence v. Miles Lab.*, 810 F. Supp. 952, 960 (E.D. Tenn. 1992); *Buckner*, 495 F. Supp. at 353; *Jones v. Five Star Engineering, Inc.*, 717 S.W.2d 882 (Tenn. 1986); *King-Bradwall Partnership v. Johnson Controls*, 865 S.W.2d 18, 21 (Tenn. Ct. App. 1993).

Whether the statute of repose is good policy is a question for the Tennessee General Assembly. *See Kochins*, 799 F.2d at 1140; *Mathis*, 719 F.2d at 139; *Jones v. Methodist Healthcare*, 83 S.W.3d 739, 744 (Tenn. Ct. App. 2001) ("Only the hardest of hearts could not feel deeply for the Plaintiffs . . . However, we are not permitted to allow sympathy to enter into our decisions on matters of law."). Five states in addition to Tennessee have statutes of repose predicated on the life of a product, but unlike Tennessee, all those states allow lawsuits for harm that does not manifest itself until after the repose period. Fla. Stat. § 95.031(c); Idaho Code § 6-1403(b)(4); Kan. Stat. Ann. § 60-3303(b)(2)(D); Tex. Civ. Prac. & Rem. Code Ann. § 16.012(d); Rev. Code Wash. § 7.72.060(1)(b)(iii).[5] Tennessee's anticipatory life provision thus appears to be the harshest of those statutes of repose, and in this case bars Plaintiff from bringing her claim for PPH.

B. Plaintiff's Reasons for Not Applying the Statute of Repose

Plaintiff argues the statute of repose should not apply because (1) she is a member of a class action whose claims were pending in 1999 and the settlement agreement for that class action preserved her right to sue for PPH; (2) Defendant waived its statute of repose defense; and (3) if a conflict exists between the laws of Tennessee and Georgia, then it is appropriate in this

---

[5] In addition, in Minnesota, evidence regarding when an injury occurred relative to the useful life of a product is one factor in determining fault. *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 832 (Minn. 1988) (citing Minn. Stat. § 604.03). And in Connecticut, the useful life of a product only becomes relevant 10 years after the product is sold. Conn. Gen. Stat. § 52-577a(c).

case to apply Georgia law. The Court will consider, and ultimately reject, each argument.

1. The original class action and its settlement agreement

Plaintiff asserts she is or was a member of a class action, which was when she actually filed her claim, and the class action settlement agreement contractually preserved her right to sue Defendant for PPH. Defendant contends the class action did not include PPH claims and does not toll the statute of repose.

Plaintiff, as a person who ingested Pondimin, was part of a class action, MDL 1203, which was certified to include "All persons . . . who ingested Pondimin." (Court File No. 98-13); *In re Diet Drugs*, MDL 1203 Pretrial Order ("PTO") 1415, 2000 WL 1222042, *69, 2000 U.S. Dist. LEXIS 12275, *209 (E.D. Pa. Aug. 28, 2000). However, the settlement agreement for that class action did not include claims based on PPH (Court File No. 98-14, p. 13). Claims based on PPH were not "settled claims" (*id.*) because the class complaint expressly excluded claims based on PPH (Court File Nos. 102-2, 102-3, 102-4, 102-5).

Upon settlement, the MDL court dismissed the class action, so the case is no longer pending. *In re Diet Drugs*, PTO 1415, 2000 WL 1222042 at *71, 2000 U.S. Dist. LEXIS 12275 at *214. Plaintiff suggests PPH claims were not dismissed, but no PPH claims were asserted. Therefore, Plaintiff's reliance on *Cronin v. Howe*, 906 S.W.2d 910 (Tenn. 1995), is not persuasive. *Cronin* dealt with a claim that had been asserted and then was non-suited before being refiled using a saving

statute. Here, Plaintiff never asserted a timely claim for PPH and no saving statute is applicable. In other words, Plaintiff was a member of the class action based on her use of Pondimin, but the harm asserted was not PPH, and so it was not until Plaintiff filed the instant case in 2005 that she asserted a claim based on PPH.

The settlement agreement "fully preserves" the rights of persons who have or develop PPH to sue. *In re Diet Drugs*, PTO 1415, 2000 WL 1222042 at *31, 2000 U.S. Dist. LEXIS 12275 at *92; (Court File No. 98-14). The settlement agreement also provides a definition for PPH (Court File No. 98-14, p. 8), and requires a plaintiff to meet that definition before she can sue Defendant for PPH. *In re Diet Drugs*, MDL 1203 PTO 2912, 2003 U.S. Dist. LEXIS 12092, *11 (E.D. Pa. July 2, 2003). That definition is a contractual provision in a freely-negotiated settlement about which all class members had notice and an opportunity to object. *In re Diet Drugs*, MDL 1203 PTO 2623, 2002 U.S. Dist. LEXIS 20323, *11 (E.D. Pa. Oct. 8, 2002). The settlement agreement gives class members with PPH "a right to the full and complete relief allowed by law." *In re Diet Drugs*, MDL 1203 PTO 3085, 2003 WL 22669132, *1, 2003 U.S. Dist. LEXIS 20221, *16 (E.D. Pa. Oct. 24, 2003). The problem for Plaintiff is the settlement agreement cannot change Tennessee substantive law. *See In re Diet Drugs*, PTO 2623, 2002 U.S. Dist. LEXIS 20323 at *13 ("Any PPH claim, of course, will be subject to the substantive law and evidentiary and procedural rules of the place where the claim is being litigated.").

Plaintiff complains the settlement agreement prevented her from asserting her PPH claim until the

PPH definition was met. The parties contractually agreed as to the administration of PPH claims, but could not create a substantive claim that is barred by Tennessee law. Furthermore, the PPH definition was articulated by leading medical experts and has never been challenged as inaccurate. *In re Diet Drugs*, PTO 3085, 2003 U.S. Dist. LEXIS 20221 at *17; *In re Diet Drugs*, PTO 2623, 2002 U.S. Dist. LEXIS 20323 at *11. "If anything, the definition is more generous to claimants than it might otherwise have been." *In re Diet Drugs*, PTO 3085, 2003 U.S. Dist. LEXIS 20221 at *17. Therefore, the settlement agreement is not what prevented Plaintiff from asserting her right to sue for PPH. The prohibition is that she developed PPH after the statute of repose period.

Plaintiff argues the following provision in the settlement agreement requires the Court to treat the class action and Plaintiff's PPH claim as a single claim: "In the event that a Class Member initiates a claim based on PPH, [Defendant] shall not assert a defense based on 'splitting' of claims, causes of action and/or parties by virtue of the fact that the Class Member is included in the Settlement, but the claim based on PPH is not a Settled Claim." (Court File No. 98-14, p. 126). Looking to the plain text of this provision, it is not applicable: Defendant is not defending the claim based on the fact that Plaintiff is a class member but PPH is not a settled claim. Although the meaning of this provision does not exactly leap off the page, the language appears to bar Defendant from asserting a defense based on claim preclusion, i.e., Defendant may not assert a PPH claim is precluded on the grounds it is the same cause of action as the class action. That reading of the language gives effect to the entire sentence. That reading also

reinforces the notion that a claim for PPH is different from the class action claims. The language refers to "initiat[ing]" a claim based on PPH, which would not be necessary if a PPH claim was already pending.

Plaintiff also points to this language in the settlement agreement, which she contends bars a statute of repose defense: "for purposes of any statutes of limitations or similar time bar, [Defendant] shall not assert that a Class Member actually had PPH unless and until the condition of the Class Member meets the definition of PPH set forth in [the settlement agreement]." (Court File No. 98-14, p. 126). Defendant contends the statute of repose is not "similar" to a statute of limitations, and notes that another provision in the settlement agreement prohibits defenses based on statutes of repose (*id.*, p. 31), so it is apparent that the drafters of the settlement agreement knew how to bar a statute of repose defense. Furthermore, the text of the provision does not actually bar Defendant from applying a statute of repose defense. The provision prevents Defendant from "assert[ing] that a Class Member actually had PPH," and it is obvious Defendant is not asserting Plaintiff had PPH. It appears the provision mentions statutes of limitations, but not statutes of repose, because it is concerned with when a plaintiff develops PPH, which may be relevant to a statute of limitations discovery rule. In other words, by preventing Defendant from claiming a plaintiff had PPH before the plaintiff meets the definition, a plaintiff may toll a statute of limitations until she

discovers she has PPH.[6] But that is not the situation here, where the date Plaintiff discovered she had PPH is immaterial to the statute of repose.

Therefore, the Court concludes Plaintiff's claim was not asserted in the original class action, and the settlement agreement cannot save the claim from the statute of repose.

2. Waiver of the statute of repose defense

Plaintiff asserts Defendant waived its statue of repose defense by not sufficiently pleading it. Specifically, Plaintiff argues Defendant never gave notice of a statute of repose defense and did not plead sufficient facts for its defense so as to give Plaintiff notice or the opportunity to conduct discovery. Plaintiff notes there was no way for her to guess that she needed to know the expiration dates on the drugs, and Defendant waited until after the close of discovery to bring its summary judgment motion raising the issue of expiration dates for the first time.

The Federal Rules of Civil Procedure require notice pleading. *See* Fed. R. Civ. P. 8. Defendant gave general notice of its statute of repose defense in the introduction to its answer, which states, "Plaintiff's causes of action are barred in whole or in part by the applicable statutes of limitations and repose," and in one of its 58 affirmative defenses: the "defenses of the

---

[6] As Defendant points out, the MDL court has recognized Defendant's right to assert a statute of limitations defense. *Mingus v. Wyeth*, MDL 1203, No. 04-23744, 2006 WL 1050289, *3, 2006 U.S. Dist. LEXIS 17557 (E.D. Pa. Apr. 20, 2006).

Tennessee Products Liability Act of 1978, as codified in [Tenn. Code Ann.] §§ 29-28-101 through 108." (Court File No. 8, pp. 2 & 32).

Even if Defendant had not relied on the statute of repose in its answer, it is unlikely the statute of repose could be waived because it is a matter of substantive law, unlike a statute of limitations, which is procedural. *Cronin*, 906 S.W.2d at 913 (citing *Bruce v. Hamilton*, 894 S.W.2d 274, 276 (Tenn. App. 1993)); *Hayes v. GMC*, No. 95-5713, 1996 WL 452916, 1996 U.S. App. LEXIS 22345, *12 (6th Cir. Aug. 8, 1996); *cf. Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 903 (6th Cir. 2002) (construing Michigan's similar statute of repose).[7]

Defendant filed this motion for summary judgment before the dispositive motions deadline but after the parties had filed extensive briefs on Daubert motions. Even if the Court were to assume Defendant delayed filing this motion in bad faith, there is no basis for concluding Defendant waived its right to rely on the statute of repose.

3. Choice of law: Georgia or Tennessee

Plaintiff argues that if the Tennessee product liability statute of repose bars her claim, then an actual conflict exists between the laws of Tennessee

---

[7] In 2006, Tenn. R. Civ. P. 8.03 was amended to add the statute of repose as an affirmative defense that must be pleaded in an answer. Because Defendant's answer asserted the statute of repose, this Court need not decide whether Tennessee's inclusion of the statute of repose as an affirmative defense affects previous Tennessee court decisions holding it cannot be waived.

and Georgia, which would necessitate the Court determining which state's law should apply. Plaintiff contends Georgia law is applicable. Defendant argues no choice of law analysis is necessary, but if it is, Tennessee law applies.

As a federal court sitting in Tennessee, this Court must apply Tennessee's choice-of-law rules. *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941); *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294 (6th Cir. 2008). A court only needs to make a choice-of-law decision when there is a conflict between the laws of two states. *Gov't Emples. Ins. Co. v. Bloodworth*, No. M2003-02986-COAR10CV, 2007 WL 1966022, 2007 Tenn. App. LEXIS 404 (Tenn. Ct. App. June 29, 2007); *see Hataway v. McKinley*, 830 S.W.2d 53, 55 (Tenn. 1992)). Here, there is a conflict because Georgia's statute of repose would not bar Plaintiff's claim. *See* O.C.G.A. § 51-1-11(b)(2).

Defendant argues it is too late for Plaintiff to seek the application of Georgia law. Defendant points to numerous references to Tennessee law in Plaintiff's complaint, briefs, and depositions and in Defendant's answer. Plaintiff contends there was no need to decide choice-of-law issues until now, but Defendant contends there have already been multiple differences in the substantive laws of the two states. Furthermore, Defendant argues Plaintiff has been on notice of the statute of repose defense since it filed its answer, and cannot now attempt to use Georgia law after the parties have been litigating this case using Tennessee

law.[8] Because this is the first time in this case the Court has been called upon to decide which law applies, the Court will do so.

Tennessee uses the "most significant relationship" approach to choice-of-law questions. *Nixon v. Waste Mgmt.*, 156 F. App'x 784, 787 (6th Cir. 2005) (citing *Hataway*, 830 S.W.2d at 59). In a personal injury action,"the law of the state where the injury occurred governs unless another state has a more significant relationship under the principles stated in § 6 [of the Restatement (Second) of Conflict of Laws] to the occurrence and the parties." *Id.* at 788 (internal quotation marks omitted).[9] Determining the more significant relationship requires the Court to consider:

(a) the place where the injury occurred,

---

[8] If the Court uses Georgia law, it must use Georgia's substantive law for the entire case. *Lemons v. Cloer*, 206 S.W.3d 60, 69 (Tenn. Ct. App. 2006) (holding the law of another state cannot be "cherry pick[ed]"; "once a Tennessee court determines that a foreign court has the 'most significant relationship,' that state's substantive law applies as fully as if the occurrence had taken place in the foreign state.").

[9] Those principles are:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Restat 2d of Conflict of Laws, § 6.

> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties,
>
> (d) the place where the relationship, if any, between the parties is centered.

Restat 2d of Conflict of Laws, § 145(2). The Court will analyze those four factors:

a. Place where injury occurred. In most tort cases, the place of injury is obvious: e.g., the site of a vehicle collision, plane crash, or construction accident. But the place of injury is not as clear when the injury is a latent disease. Plaintiff argues the injury occurred primarily in Georgia because that is where Defendant's actions caused this lawsuit and is where Plaintiff filled her Pondimin prescriptions and first ingested Pondimin.[10] Defendant argues the injury occurred in Tennessee, where Plaintiff resides and developed the disease allegedly from drugs she bought to consume in Tennessee. There is no Tennessee law for determining where a latent injury is suffered. Plaintiff's injury is PPH. There is no indication Plaintiff suffered from PPH in Georgia. Rather, she developed PPH while living in Tennessee and has been treated for the disease in Tennessee. This conclusion comports with the language of Tennessee's product liability statute of limitations, which specifies that a

---

[10] Although Plaintiff first ingested Pondimin in Georgia, she states she mostly ingested it in Tennessee.

cause of action accrues when a plaintiff suffers her injury, not when she purchases a product. Tenn. Code Ann. § 28-3-104(b)(1).[11] Since Plaintiff developed her injury while living in Tennessee, her place of injury is Tennessee.

b. Place where the conduct causing the injury occurred. Plaintiff argues the conduct causing the injury occurred in Georgia, and Defendant does not expressly dispute this. Plaintiff bought Pondimin from a clinic in Georgia because Tennessee banned its sale at the time she started taking the drug. She was prescribed the drug by Georgia doctors and signed a consent form with the proscribing clinic in Georgia. In prescribing the drugs, the doctors in Georgia relied on allegedly false information from Defendant. Based on these facts, it can reasonably be stated that the conduct causing Plaintiff's injury occurred in Georgia.

c. Domicile, residence, nationality, place of incorporation and place of business of the parties. Plaintiff has lived in Tennessee during the relevant time periods. Defendant is incorporated in Delaware and has its principal place of business in New Jersey.

d. Place where the relationship, if any, between the parties is centered. Plaintiff argues the parties' relationship was in Georgia, but there was

---

[11] Plaintiff points to *Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 434-36 (N.Y. 1993) for the proposition an injury is complete at the moment of exposure. But that holding essentially relies on the lack of a discovery rule, which is not the case in Tennessee, where a cause of action does not accrue until a plaintiff discovers she suffered an injury.

no direct relationship. The only direct relationship between the parties was in the class action, in which Defendant sent information to Plaintiff in Tennessee, although the class action is not part of the injury that caused Plaintiff's lawsuit. The indirect relationship Plaintiff and Defendant had in Georgia weighs in favor of Georgia, but is weak.

Evaluating those factors, the Court concludes Tennessee has the most significant relationship. Tennessee is where Plaintiff consumed Pondimin and suffered her injury. In contrast, the only contact with Georgia is that Plaintiff purchased Pondimin from a third party there. That is less significant than the contacts in *In re Bendectin Litigation*, 857 F.2d 290, 305 (6th Cir. 1988), where Ohio was not only the state of distribution but also the state where the drugs in question were manufactured, a fact the Court emphasized in deciding it was proper to apply Ohio law.

Furthermore, the principles in the Restatement (footnote 9, *supra*) suggest Tennessee law should apply. Plaintiff argues Tennessee has an interest in compensating its resident and Georgia has an interest in regulating a product sold in its state. But this argument fails. Tennessee's interest is not in compensating its resident for harm done to her. Such an interest may be a good idea, but that is a decision for the General Assembly, not the Court. The policy of Tennessee as exemplified through its statute of repose is that residents who suffer from diseases with long incubation or latency periods are not entitled to recover for harms done to them. Although this statute is designed to limit product liability costs for manufacturers and sellers, it is not inapplicable

merely because the product was not purchased in Tennessee. Pondimin was sold for a short period of time in Tennessee, and PPH is not the only latent disease for which the legislature decided not to create an exception. To the extent Tennessee wants to protect Pondimin's manufacturers and sellers from product liability costs, the statute advances that goal. And while Georgia does have an interest in regulating a product sold there, Tennessee has an interest in regulating a product used here; it chooses to effect that interest by strictly limiting the time that actions can be brought.

Although the exclusive use of Tennessee law in pleadings, briefs, and depositions is not dispositive to this issue, it does relate to the principles in the Restatement. For instance, "ease in the determination and application of the law to be applied" and the "needs of the interstate" system are harmed by changing the governing law after the parties, through their course of conduct, have settled on a state's law. Likewise, the Court cannot protect "justified expectations" if it switches the law after the parties have extensively relied on Tennessee law. Using Tennessee's law also increases the "certainty, predictability and uniformity of result"; it would be harmful if a party could change the governing law whenever faced with a dispositive motion. As stated in *Hataway*, these principles are only part of the determination of which state has the most significant relationship. In this case, where a Tennessee resident bought Pondimin from a third party in Georgia, and used the drug mostly in Tennessee, causing her illness in Tennessee, and where the parties have already relied exclusively on Tennessee law, the Court concludes Tennessee law is applicable.

IV. CONCLUSION

It has been 30 years since Tennessee enacted its product liability statute of repose. The statute's rarely-invoked anticipated life provision can bar a claim even before the cause of action accrues, such as in this case, where Plaintiff alleges she suffers from a latent disease but lacks a cause of action against Defendant. The Court agrees this results in a harsh outcome, but that is the law of Tennessee and that is why Defendant's motion for summary judgment must be **GRANTED**.

An Order shall enter.

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

No. 1:05-CV-323

[Filed March 19, 2009]

ANGELA MONTGOMERY,	)
	)
Plaintiff,	)
	)
v.	)
	)
WYETH, f/k/a American Home Products Corp., AHP SUBSIDIARY HOLDING CORPORATION, f/k/a Wyeth-Ayerst, Laboratories Company; WYETH PHARMACEUTICALS, INC., f/k/a Wyeth-Ayerst Pharmaceuticals, Inc.,	)
	)
Defendants.	)

Chief Judge Curtis L. Collier

ORDER

For the reasons stated in the accompanying memorandum, Defendant's motion for summary judgment is **GRANTED** (Court File No. 83) and this case is **DISMISSED**.

SO ORDERED.

ENTER:

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

No. 1:05-CV-323

[Filed May 22, 2009]

ANGELA MONTGOMERY,	)
	)
Plaintiff,	)
	)
v.	)
	)
WYETH, f/k/a American Home Products Corp., AHP SUBSIDIARY HOLDING CORPORATION, f/k/a Wyeth-Ayerst, Laboratories Company; WYETH PHARMACEUTICALS, INC., f/k/a Wyeth-Ayerst Pharmaceuticals, Inc.,	)
	)
Defendants.	)

Chief Judge Curtis L. Collier

ORDER

Before the Court is Plaintiff Angela Montgomery's motion to alter or amend the Court's judgment against her (Court File No. 110). The Court has carefully

considered Plaintiff's briefs (Court File Nos. 111, 113) and Defendant Wyeth's brief (Court File No. 112), and concludes the judgment was correct. Accordingly, the Court **DENIES** Plaintiff's motion (Court File No. 110).

I. STANDARD OF REVIEW

Plaintiff makes her motion pursuant to Fed. R. Civ. P. 59(e), which authorizes a district court to alter or amend a judgment upon motion of a party no later than ten days after the judgment. A district court may grant such motion (1) to correct a clear error of law; (2) to account for newly-discovered evidence; (3) to accommodate an intervening change in controlling law; or, (4) to otherwise prevent manifest injustice. *Henderson v. Walled Lake Consol. Schs*, 469 F.3d 479, 496 (6th Cir. 2006).

Motions for reconsideration or to alter or amend a judgment are rarely granted. "In practice, because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied." 11 Charles Alan Wright, et al., Federal Practice and Procedure Civil 2d § 2810.1; *see also Ruscavage v. Zuratt*, 831 F.Supp. 417, 418 (E.D. Pa. 1993) (noting Rule 59(e) motions "should be granted sparingly because of the interests in finality and conservation of judicial resources").

II. DISCUSSION

This is a products liability case in which Plaintiff alleged Defendant's diet drug Pondimin caused her to develop Primary Pulmonary Hypertension (PPH). Relying on a rarely-invoked portion of Tennessee's product liability statute of repose, Defendant moved for summary judgment, which the Court granted

(Court File No. 109). In its decision, the Court suggested the statute of repose as applied was unduly harsh, but concluded it applied to this case (Court File No. 108). Plaintiff asks the Court to alter its previous judgment and allow her case to proceed without the need for a timeconsuming appeal. However, the Court concludes its original decision is correct.

A. When PPH Claims Were Originally Made

One of Plaintiff's original arguments in opposition to summary judgment was that her PPH claim has been pending since 1999 (and thus not barred by the statute of repose) because it was part of a class action, MDL 1203, on behalf of people who ingested Pondimin. The Court rejected this claim, concluding that PPH claims were not part of the class action and were subject to state laws, such as the statute of repose.

In this motion, Plaintiff contends the Court's conclusion leads to another conclusion: that the class in MDL 1203 was constitutionally deficient for not protecting the rights of people with latent PPH claims. Because the MDL 1203 class was constitutionally adequate, Plaintiff contends this Court must have erred.[1] Plaintiff's central argument is that she asserted

---

[1] Although Plaintiff's opening brief is unclear as to whether she is launching a collateral attack on the settlement in MDL 1203, her reply brief clarifies that she is not. Indeed, if she were to somehow successfully challenge the settlement, as was the situation in the case cited by Plaintiff, *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), then she would no longer be bound by the class settlement, but that would leave her in the same position as right now, forced to pursue a PPH claim under a state law that prohibits it.

her PPH claim in MDL 1203. The Court fully address this issue in its original Memorandum. Nevertheless, the Court will briefly address some of Plaintiff's arguments in her new motion.

Plaintiff points to language indicating that the class included "all persons who took Pondimin and/or Redux, including necessarily those who did or would later suffer from PPH." It is clear from this language that people who had or would later suffer from PPH are included in the class along with all other persons who ingested Pondimin. But the class itself did not include claims for PPH. Rather, the class "fully preserve[d]" the right of class members to sue for PPH when they developed it. This was a contractual obligation. The settlement agreement guarded against the running of statutes of limitations but not against Tennessee's statute of repose. Rather, the settlement agreement acknowledged that PPH claims would have to be brought according to the substantive law of the states. In Plaintiff's case, that substantive law bars her claim.

B. Choice of Law

In opposing summary judgment, Plaintiff requested the Court apply Georgia law, under which the statute of repose would not apply. After evaluating Tennessee's choice of law rules, the Court concluded Tennessee law applies.

In the instant motion, Plaintiff contends her claim for breach of implied warranty must use Georgia law, and therefore her entire case must use Georgia law. She argues Georgia law is proper for that claim because the contract to purchase Pondimin was

entered into in Georgia. As Defendant points out, however, the contract was entered into with a third party, not Defendant. Furthermore, Tennessee's product liability law governs regardless of whether an individual claim is labeled as breach of warranty. Tenn. Code Ann. § 29-28-102(6).

Plaintiff also contends Georgia law is applicable based on the policy interests of Georgia and Tennessee applicable to this case. Plaintiff argues that in evaluating the relevant policies of the forum, the Court should have considered those interests based on the facts of this case. *See, e.g.*, *MacDonald v. GMC*, 110 F.3d 337, 344-45 (6th Cir. 1997) (evaluating interests of two states in applying their own laws to "this particular" claim). Although the Tennessee statute of repose bars recovery by people with long latency periods, Plaintiff notes that the actual purpose is to keep product liability insurance rates low, and this purpose is not actually accomplished by the statute of repose. Plaintiff makes a somewhat compelling point, but it is diminished because insurance rates would reflect that Pondimin is expected to be used not only in the state of purchase. For instance, in this case, the pills were purchased in Georgia for use in Tennessee. Regardless, Plaintiff's argument does not establish a clear error of law as to the decision to apply Tennessee law. The relevant policies of the states is only a part of the analysis, and Plaintiff's argument does not disturb the rest of the Court's analysis of the more significant relationship or the other principles of § 6 of the Restatement (Second) of Conflict of Laws.

In addition, Plaintiff's contention that the Court erred by referring to the "exclusive" use of Tennessee law is not persuasive. Although the parties certainly

cited cases from other states in their briefs, there was no indication another state's law applied. In particular, the pleadings relied on 5 Tennessee law. As Plaintiff mentions in her brief, her implied breach of warranty claim could not have survived in Georgia.

C. Fenfluramine

Plaintiff argued in opposition to summary judgment that some Pondimin was purchased in Europe and therefore not subjected to stability testing in the United States, which would mean an expiration date was not required by law and the statute of repose is not applicable. The Court rejected Plaintiff's contention, and does so again for the same reason. Although some fenflurmanine was purchased outside the United States, Defendant's evidence still establishes that it manufactured all Pondimin tablets in the United States.

III. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff's motion to alter or amend the Court's judgment against Plaintiff (Court File No. 110).

SO ORDERED.

ENTER:

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-5701

[Filed October 23, 2009]

ANGELA MONTGOMERY,

Plaintiff-Appellant,

v.

WYETH, FORMERLY KNOWN AS AMERICAN HOME PRODUCTS CORPORATION, ET AL,,

Defendants-Appellees.

Before: SUHRHEINRICH, GILMAN, and WHITE, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX E

U.S. Const. Amend. V

The Fifth Amendment of the U.S. Constitution provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."